(20,614.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 254.

E. J. PAGE AND ROBERT MARKERT, EXECUTORS OF THOMAS MERRIAM, DECEASED, APPELLANTS,

vs.

H. F. ROGERS, TRUSTEE OF I. B. MERRIAM, BANKRUPT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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No. 1389.

United States Circuit Court of Appeals, Sixth Circuit.

In Bankruptcy.

H. F. ROGERS, Trustee of the Estate of I. B. Merriam, Bankrupt, Appellant,
vs.
E. J. PAGE and ROBERT MARKERT, Executors of the Estate of Thomas Merriam, Deceased, Appellees.

Cross-Appeals.

Appeals from the District Court of the United States for the Eastern District of Tennessee.

Record.

Original Transcript Filed December 22, 1904.

1 *Transcript of Record.*

Term Caption.

April Term, 1904.

Be it remembered that at a District Court of the United States begun and held for the Southern Division of the Eastern District of Tennessee at the court rooms in the city of Chattanooga within said district and the Sixth Circuit, on the first Monday, it being the 4th day of April, A. D. 1904. Present and presiding, the Hon. C. D. Clark, District Judge. Among the proceedings had were the following, to-wit:

(Here follows order allowing trustee to file petition and granting restraining order. Filed 26th day of June, 1903.)

No. 517.

H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM ET AL.

In re Bankruptcy of I. B. MERRIAM.

In this cause it is ordered, on motion of petitioner, that the petition be filed as prayed and that publication be made for defendants Thomas Merriam and the Tennessee Coal & Lumber Company re-

quiring them and each of them to appear and answer said petition on or before the first Monday in ——, 1903.

It is further ordered that said defendants, Thomas Merriam and the Tennessee Coal & Lumber Company, and each of them, be restrained and inhibited from in any manner selling, transferring, conveying or encumbering the real estate described in said petition until further order of this court, it now appearing to the court that unless such restraining order is granted them there is danger of irreparable injury being caused to petitioner.

C. D. CLARK, *Judge.*

2 Here follows petition of H. T. Rogers, Trustee, filed June 26, 1903:

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

In re I. B. MERRIAM, Bankrupt.

To the Honorable C. D. Clark, Judge, etc.:

H. F. Rogers, Trustee, a citizen and resident of Chattanooga, Hamilton county, Tennessee, brings this, his petition, against Thomas Merriam, a citizen and resident of the State of New York, residing at Syracuse, New York, and the Tennessee Coal & Lumber Company, a corporation organized and existing under and by virtue of the laws of the State of New York and with *his* principal office in the city of Syracuse in said State, leave so to do having been first obtained from this court.

Petitioner respectfully shows to the court:

1. That on the — day of June, 1903, I. B. Merriam, a citizen and resident of Chattanooga, Tennessee, filed his voluntary petition in bankruptcy in this cause; that on the — day of June, 1903, he was duly adjudged a bankrupt, and that in the meantime petitioner has been duly appointed and elected and has duly qualified as trustee in this cause, and in such capacity he files this his petition.

2. In the schedule of assets attached to the petition in bankruptcy of said I. B. Merriam is set forth what purports to be all of the property, real, personal and mixed belonging to said bankrupt, which property has since been duly appraised and is valued as follows:

The personal property, consisting of stock of merchandise and fixtures, valued at about $1,100.

Accounts and bills receivable that are regarded fairly collectible from $1,000 to $1,500.

The real estate consists of property within the county of Hamilton, Tenn., and is valued at about $40,000.

The total liabilities set forth in the schedule of debts of said bankrupt aggregate the sum of $75,000.00, of which amount the aggregate amount of $38,000 is secured by a first mortgage on the real estate thereinbefore described. It is therefore manifest, on the showing of assests and liabilities set forth under the petition in bank-

ruptcy filed by said bankrupt, that the general and unsecured creditors will practically receive nothing.

3 3. Petitioner however charges that there are other and additional assets and of greater value to said bankrupt within the jurisdiction of this Honorable Court, which should be subjected to the payment of the debts of said bankrupt and which, for this purpose, should be impounded by this court. The facts concerning this charge are as follows:

On or about the 1st day of June, 1903, said bankrupt, I. B. Merriam, was the owner of an undivided one-half interest in ten thousand acres of coal land situated in Cumberland county, Tennessee, valued at $20.00 per acre. This property, at the date before mentioned, was own-d in common by said bankrupt and one G. H. Jarnigan, and had been so held by them for many years.

On the date above mentioned, the said bankrupt executed and delivered to defendant, Thomas Merriam, his brother, a deed, conveying to him in fee simple, his interest in the coal lands above described and on the same date and about the same time, said Thomas Merriam purported to convey the same property to the defendant, The Tennessee Coal & Lumber Company, a corporation, which the said Thomas Merriam had organized for the purpose of taking title to said real estate and of which corporation the said Thomas Merriam was the principal stockholder. This trade was consummated in Syracuse, New York, on the date above mentioned, at which place the said bankrupt had gone for this purpose.

Immediately after this trade was closed, said bankrupt returned to his home in the city of Chattanooga, Tennessee, bringing with him two deeds just described, which deeds he immediately put of record in the county where said property is situated, and within a few days thereafter and as soon as the papers could be drawn, he filed his petition in bankruptcy in this cause.

4. Petitioner avers that the consideration expressed in the deed just described from said bankrupt to his brother defendant, Thomas Merriam, was a nominal consideration.

But the facts connected with said transfer were as follows:

For some years prior to this time, said bankrupt had been in failing circumstances and at no time had he been solvent within the meaning of the bankruptcy law. For the last four or five years, his assets have practically remained the same as they were on or about the first day of June of this year as hereinbefore described, save and

4 except that his stock of goods, he being a merchant, has continually decreased owing to his inability to secure credit, and the necessity to meet the interest charges on the indebtedness which he was owing.

Your petitioner is informed and believes and so charges that during this time and even as far back as 8 or 9 years ago, the defendant Thomas Merriam had been the financial backer of his brother, the said bankrupt, has loaned him money, has endorsed various paper of said bankrupt at bank and to various individuals.

Petitioner is not informed as to the extent of these advancements or those indorsements, but he understands that they aggregate a large sum.

During the last two or three years, the said bankrupt has had great difficulty in resisting the importunities of his creditors, in paying the interest charges on his debts at bank and otherwise, and to accomplish this purpose, has had frequently occasion to borrow money from his brother, defendant Thomas Merriam.

Of this condition of affairs, defendant, Thomas Merriam was fully aware, he fully knew that said bankrupt was largely insolvent, and that at no time during the last three or four years would his property, at a fair valuation, pay at the most more than 40 or 50 per cent. of his liabilities.

The said bankrupt, for the purpose of gaining additional indulgences from his many creditors and to save himself from insolvent proceedings, has repeatedly and time and again during the last two years represented to his creditors that he was on the eve of selling his one-half interest in the coal lands hereinbefore described at the price of $20.00 per acre or thereabouts; that if unduly pressed by his creditors he would be prevented from making said sale, not only to his detriment but to their great loss, and that if permitted to take his own course he would succeed in disposing of said coal lands, and if in this he succeeded, he would be able to pay off his creditors in full.

Relying upon these assurances, the many creditors of said bankrupt have indulged him until the 1st of June last, when said coal lands were transferred as hereinbefore described.

During this period petitioner is informed and charges that said bankrupt did make many and earnest efforts to sell his interest in said coal lands without success. During the last two or three years said bankrupt has renewed his assurances to the various creditors, stating that he was about to sell out his coal lands as aforesaid, and that if they would wait upon him and not bring suit, that whenever said sale was consummated, he would pay their demands.

On or about the last day of May of this year, he informed various of his creditors that he had succeeded in disposing of his coal lands, and was going to New York for the purpose of closing the trade. Accordingly said bankrupt did go to New York as hereinbefore set forth and executed the deed hereinbefore described.

As a matter of fact petitioner charges that said bankrupt was paid nothing by Thomas Merriam, the defendant, for making the transfer aforesaid of said coal lands, and that said transfer was made wholly without a valuable consideration. That said grant and conveyance of the coal lands aforesaid was had, made and contrived of malice, fraud, covin and collusion to the intent and purpose to hinder and delay and defraud the creditors of said bankrupt of their lawful and just actions, suits, debts and acts, and therefore wholly null and void.

And, further, your petitioner charges that said Thomas Merriam took said conveyance from said bankrupt well knowing the fraudulent purpose and character thereof, and with the intent to aid said bankrupt to hinder, delay and defraud his other creditors, to-wit, its creditors of said bankrupt in this cause.

And petitioner further avers that said conveyance was collusively made to this end and for the special benefit of said defendant Thomas Merriam and said bankrupt. As already averred, there was no cash paid at all in said transaction, and any consideration expressed in the deed or otherwise, was a mere device in furtherance of covin, collusion and fraud, whereby the defendants and said bankrupt were contriving to hinder and delay the other creditors of said bankrupt.

5. Petitioner further avers that the reasonable value of the interest conveyed as aforesaid by said bankrupt to his brother, defendant Thomas Merriam is the sum of $100,000. Petitioner charges that there was a secret agreement between said bankrupt and said Thomas Merriam, that the latter would give said bankrupt the sum of $75,000 for the latter's interest in said property, and this was the purchase price agreed upon between them. But as a matter of fact, not one dollar of said purchase price was paid by said Thomas Merriam to said bankrupt, but, on the contrary, the former pretended to withhold and appropriate to his own use and benefit the said purchase price of $75,000, and the same is now over due and unpaid.

There is, therefore, due the estate of said bankrupt by said
6 Thomas Merriam the sum of $75,000 on account of the unpaid purchase price for said lands, that said sum or unpaid purchase price is a lien upon the real estate thus conveyed and that it is a right of the creditors of said bankrupt to have said property impounded and said lien enforced, and for this purpose to have the interest conveyed by said bankrupt to said Thomas Merriam sold by this court to satisfy said lien, and it is a further right of petitioner as a representative of the creditors of said bankrupt to have a decree or judgment against defendant Thomas Merriam for the full amount of the value of said property or the unpaid purchase price thereof.

Petitioner is further informed that defendant Thomas Merriam claimed that, while in fact he paid nothing to said bankrupt on account of the purchase of said property hereinbefore described, the agreed purchase price of $75,000 was appropriated in liquidation of claims or demands that said defendant had against said bankrupt for money advanced to and endorsements made for said bankrupt;

And that, in this manner, said defendant consumed for his own use and benefit the total of the purchase price of said property.

Petitioner avers that if this be true, it is also true that, at the time said appropriation was made, said defendant, Thomas Merriam, not only had reasonable cause to believe that his brother, the said bankrupt, was actually insolvent but in fact knew that he was insolvent. Not only that he had reasonable cause to believe that by said transaction it was intended to give a preference to said defendant, but he actually knew that thereby he did in fact obtain a preference.

Therefore petitioner further avers that said appropriation by said defendant of the purchase price of said real estate is void and an unlawful preference in the bankruptcy act, and that petitioner has the right to have said unlawful preference set aside and declared null and void and the property aforesaid impounded and administered in this court for the benefit of the lawful creditors in this cause.

7. Petitioner is informed and believes and so charges that the Tennessee Coal & Lumber Company defendant, was organized by defendant Thomas Merriam at the time the transfer aforesaid was made and for the purpose of taking title as quickly as possible to the property thus conveyed. That the principal stockholder in said corporation is Thomas Merriam. That said corporation is not an
7 innocent purchaser for value of the property hereby described and conveyed as hereinbefore mentioned by said Thomas Merriam to said corporation. But that said corporation took title from said Thomas Merriam with full knowledge of the circumstances hereinbefore set forth and in fact paid nothing to said Thomas Merriam for said conveyance further than to issue to him certain paid up stock.

Petitioner therefore charges that if said corporation has title to said property it takes said title subject to all liens and demands that petitioner has under the facts hereinbefore charged against defendant Thomas Merriam and subject to all liens and equities and rights and demands belonging to petitioner in the premises.

8. Petitioner further charges that as a matter of fact said defendant corporation has no title whatever to said property. He charges that said defendant is a foreign corporation as hereinbefore described.

That at the time the transfer hereinbefore mentioned was made to it by defendant Thomas Merriam, said corporation had failed to comply with the laws of Tennessee governing foreign corporations in that said defendant had not filed a copy of its charter with the Secretary of State at Nashville, Tenn., and had not filed an abstract of said charter in the register's office of the county in which said lands are located.

And petitioner further charges that defendant company has not since that time filed copy of its charter or abstracts of its charter as required by the laws of said State, and therefore under the laws of Tennessee said corporation is incapable of taking title to the property, and that said title is still in defendant Thomas Merriam, subject to all of the equities, claims and demands hereinbefore set forth and described.

9. Petitioner says that a more particular description of the coal lands hereinbefore mentioned is as follows:

The following described real estate lying in county of Cumberland, and State of Tennessee, consisting of two tracts of land, to-wit:

First tract. All of the land conveyed by Grant No. 23,822 issued by the State of Tennessee to Robert Burke and Elijah Haley on the 7th, day of June, 1841, the courses and distances of said land as described in said grant being as follows:

Beginning at a white-oak marked E. H., standing on the line that divides the counties of Morgan and Bledsoe; thence with the meanders of the county line, the several courses being south
8 70 east, passing Robert Burke's house at the Crab Orchard at 320 poles, in all 1600 poles, to a white oak marked R. B. on the County line; thence north 50 degrees east crossing Fall Creek 120 poles; in all 352 poles to a black oak, black gum and hickory;

thence north 20 deg. East 148 poles to a white oak marked P. H.; thence north 20 deg. West crossing a branch at 20 poles, in all 726 poles, to a chestnut oak on the point of a ridge; thence north 65 deg. west 510 poles to a white oak marked P. M. C. and four white oak pointers, this line crossing the Waller Branch at Staples' Camp; thence a direct line to the beginning. The calls of this survey include 7500 acres out of which is taken by prior claims 2500 acres, leaving a balance of 5000 acres.

Second tract. All the land conveyed by grant No. 23,823 issued by the state of Tennessee to Robert Burke and Elijah Haley on June 17, 1841, the courses and distances of said lands, as described in said grant, being as follows:

Beginning on a white oak marked E. H. on the county line between Morgan and Bledsoe counties, it being the beginning corner of a survey made by Burke and Haley on entry No. 2444; thence with the county line North 60 deg. West 820 poles to a stake 10 poles north of John Kimmer's house; thence north 40 deg. west on the county line 354 poles to a white oak, corner to the Lane and Eastland survey; thence north 35 deg. East 380 poles to a white oak marked L, thence south 60 east crossing the trail that leads from John Kimmer's to Jesse Mumford's at 220 poles, in all 404 poles, to a Spanish oak marked P. C. and pointers, thence south 30 deg. East 298 poles to a white oak marked P. M. C.; thence south 80, east 156 poles to a white oak marked P. S. and pointers; thence north 10 deg. East 128 poles to three white oaks growing from one root; thence north 60 deg. east 114 poles to a hickory in a flat north of a pine thicket; thence due east crossing Daddy's creek 284 poles to a large white pine marked E. G. H.; thence north 60 deg. East 74 poles to a white pine marked R. B., thence north 67 deg. East 580 poles to a white oak, last corner of a survey on Entry No. 2444; thence a direct line to the beginning.

Prayer.

Premises considered, Petitioner prays:

For leave to file this petition in this cause or as an independent bill.

1. That defendants Thomas Merriam and the Tennessee
9 Coal & Lumber Company be made parties to this cause by publication in the manner provided by the acts of congress.

2. That a decree or judgment be rendered declaring that the sale or transfer of the property hereinbefore described, made by the bankrupt be declared null and void, because the same was made in fraud of the rights of the creditors of said bankrupt. And that said property be decreed the property of said bankrupt and seized and taken possession of by this court and sold under the orders of this court for the benefit of said creditors in this cause.

3. That if petitioner be mistaken in his rights in the premises, then in the alternative he prays that a decree be rendered against defendant for the purchase price of said property, towit; the sum of $75,000. That the same be declared a lien upon the property aforesaid and that said property be impounded by this court, and sold

under orders of this court to enforce said lien for the benefit of the creditors of this cause.

4. That the appropriation by said Thomas Merriam of the purchase price of said property, to wit; the sum of $75,000, in satisfaction and payment of demands that he had against the bankrupt in this cause for money loaned said bankrupt, and for endorsement made for the benefit of said bankrupt be declared null and void as an unlawful preference under the bankruptcy laws, in that said defendants at the time said appropriation was made intended thereby to obtain a preference and did thereby obtain a preference over other creditors, the said bankrupt being then insolvent within the knowledge of said bankrupt and within the knowledge of said defendants and to the extent of $75,000, a lien be declared on the property aforesaid for the benefit of the creditors in this cause and that said property be impounded to the end that said lien may be enforced and sold for the benefit of said creditors. And that a decree or judgment be rendered against said defendants to the extent of the said amount, towit; of $75,000.

5. That the transfer of said property to defendants in satisfaction of their claims or demands as creditors against the bankrupt in this cause be declared an unlawful preference within the meaning of the bankruptcy act in that at the time it was made said bankrupt was insolvent within the knowledge of said bankrupt and defendants. And with this knowledge or having reasonable cause to believe the same, they took said property with the intent and with the effect of obtaining a preference under the bankruptcy laws.

And that said transfer be set aside and the property in question impounded as the property of the bankrupt in this cause, and the same be sold under the orders of this court for the benefit of the creditors of said bankrupt therein.

6. That an injunction issue restraining the defendants and each of the- from in any manner encumbering the title to said property or transferring the same to any person or corporation, until the final decree in this cause.

7. That petitioner have such other, further and general relief as he may be entitled to under the premises. The answer under oath of defendants is hereby expressly waived.

H. F. ROGERS, *Trustee.*
PRITCHARD & SIZER,
WILLIAMS & LANCASTER,
Solics. for Trustee.

H. F. Rogers upon oath says that he is the duly appointed and qualified trustee in bankruptcy in this cause; that the facts stated in the petition are true of his own knowledge and those upon information and belief he believes to be true.

H. F. ROGERS.

Subscribed and sworn to before me this 26th. day of June, 1903.
D. L. GRAYSON, *Referee.*

Endorsed: Filed June 26th, 1903. Jno. D. Key, Deputy Clerk.

(Here follows order granting restraining order etc., filed June 27, '03.)

In the District Court in and for the Southern Division of the Eastern District of Tennessee.

H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM ET AL.

In re Bankruptcy of I. B. MERRIAM.

No. 517.

Whereas on the 26th day of June 1903, petition was filed in this caused by H. F. Rogers, Trustee against Thomas Merriam
11 and the Tennessee Coal & Lumber Company both non-residents of the State of Tennessee, which said petition prays to seize and impound and to enforce a legal and equitable lien upon and claim to the following real estate in the County of Cumberland and State of Tennessee, to-wit:

An undivided one-half interest in and to the following:

First tract. All the land covered by Grant No. 23,822 issued by the State of Tennessee, to Robert Burke and Elijah Haley on the 7th day of June, 1841, the courses and distances of said lands as described in said grant being as follows:

Beginning at a white oak marked E. H. standing on the line that divides the counties of Morgan and Bledsoe thence with the meanders of the county line, the several courses being south 70 East, passing Robert Burke's house at the Crab Orchard at 320 poles, in all 1,600 poles to a white oak marked R. B. on the County line; thence north 50 degrees east, crossing Fall creek at 120 poles, in all 352 poles to a black oak, black gum and hickory; thence north 20 degrees east 148 poles to a white oak marked P. H.; thence north 20 degrees west crossing a branch at 20 poles, in all 726 poles, to a chestnut oak on the point of a ridge; thence north 65 degrees west 510 poles to a white oak marked P. M. C. and four white oak pointers, this line crossing the Waller branch at Staples' camp; thence a direct line to the beginning. The calls of this survey include 7,500 acres out of which is taken by prior claims 2,500 acres, leaving a balance of 5,000 acres.

Second tract. All the land covered by grant No. 23,823, issued by the State of Tennessee to Robert Burke and Elijah Haley on June 17th, 1841, the courses and distances of said lands, as described in said grant, being as follows:

Beginning on a white oak marked E. H. on the county line between Morgan and Bledsoe Counties, it being the beginning corner of a survey made by Burke and Haley on Entry No. 2,444; thence with the county line north 60 degrees west 820 poles to a stake 10 poles north of John Kimmer's house; thence north 40 deg. west on

the county line 354 poles to a white oak, corner to the Lane and Eastland survey; thence north 35 degrees east 380 poles to a white oak marked L. thence south 60 east crossing the trail that leads from John Kimmer's to Jesse Mumford's at 220 poles, in all 404 poles, to a Spanish oak marked P. C. and pointers; thence south 30 degrees east 298 poles to a white oak marked P. M. C. thence south 80 east 156 poles to a white oak marked P. S. and pointers; thence north 10 degrees, east 128 poles to three white oaks growing
12 from one root; thence north 60 degrees East 114 poles to a hickory in a flat North of a pine thicket; thence due East crossing Daddy's creek 284 poles to a large white pine marked E. G. H.; thence north 60 degrees east 74 poles to a white pine marked R. B.; thence north 67 deg. east 580 poles to a white oak; last corner of a survey on Entry No. 2,444; thence a direct line to the beginning.

Now therefore it is ordered by the court that said Thomas Merriam and the Tennessee Coal & Lumber Company, defendants in said petition be required to appear, plead, answer *to* demur to said petition on or before the first day of September next, or the said petition will be taken as confessed as to said defendants.

It is further ordered by the court that pending the hearing on said petition the said defendants, Thomas Merriam and the Tennessee Coal & Lumber Company, and each of them be, and they are, hereby, restrained and enjoined and inhibited from selling, transferring or in any manner disposing of or encumbering the real estate described herein.

It is further ordered by the Court that a copy of this order be forthwith served on said non-resident defendants by the Marshal of the District Court of the United States in and for the Northern Division of the State of New York. It appearing that both of said non-resident defendants are residents or inhabitants of said Northern District of the State of New York.

It is further ordered by the court that the order of publication heretofore made in this cause be for the present suspended.

Enter this, CLARK, *J.*

13 Here follows answer of Thomas Merriam to petition of H. F. Rogers, Trustee, filed Aug. 1st, 1903:

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

In re I. B. MERRIAM, Bankrupt.

H. F. ROGERS, Trustee, Petitioner,

vs.

THOMAS MERRIAM and TENNESSEE LUMBER AND COAL COMPANY.

The defendant, Thomas Merriam, a citizen and resident of the State of New York, residing at Syracuse, N. Y., for himself only

answers the bill of complaint and petition of the complainant above named, H. F. Rogers, Trustee, and respectfully shows to the court:

That said defendant, Thomas Merriam, has no knowledge as to the allegations contained in the petition herein of the filing of a voluntary petition in bankruptcy by I. B. Merriam, or as to his adjudication as a bankrupt, or as to the appointment and election and qualification of the petitioner as trustee in this cause.

Defendant Thomas Merriam alleges that he has no knowledge of the filing of a schedule of assets attached to the petition in bankruptcy of said I. B. Merriam, or as to whether or not such alleged schedule sets forth what purports to be all of said property, real, personal and mixed, belonging to said bankrupt.

Said defendant also denies any knowledge as to whether or not the property mentioned in said alleged schedule has been duly appraised or as to what its value is, or as to the total liability set forth in said schedule, or as to the alleged fact that it is manifest on the showing of assets and liabilities set forth under the petition in bankruptcy filed by said bankrupt, that the general and unsecured creditors will receive nothing.

Defendant, upon information and belief, denies that there are other and additional assets of said bankrupt within the jurisdiction of this Honorable Court which should be subjected to the payment of the debts of said bankrupt, and denies that there are any
14 assets of said bankrupt within the jurisdiction of this Honorable Court or elsewhere other than those stated and set forth in the schedule annexed to the petition of I. B. Merriam, bankrupt, and referred to in the petition in this proceeding.

Defendant Thomas Merriam admits that said bankrupt, I. B. Merriam, was, on or about the first day of June, 1903, the owner of an undivided one-half interest in ten thousand acres of coal lands or in any other number of acres of coal lands situate in Cumberland county, Tennessee, or elsewhere. But defendant alleges that said title was incumbered to amount of more than $40,000, by two several trust deeds, one for the benefit of the defendant to secure him to the extent of $35,000, given by said I. B. Merriam to Thomas W. Merriam, as trustee, and dated and delivered on or about April 11th, 1899; and one for the benefit of the First National Bank of Chattanooga, to secure said bank to the extent of $4,000, the date of which deed is unknown to this defendant.

Defendant admits that on or about the first day of June, 1903, said bankrupt, I. B. Merriam and his wife, —— Merriam, jointly with G. H. Jarnigan and wife executed and delivered to this defendant, for a full, adequate and present fair consideration, a deed conveying to defendant the interests of said I. B. Merriam and G. H. Jarnigan in the coal lands mentioned in said petition.

Defendant admits that on or about the same date, this defendant conveyed the said property to the Tennessee Lumber & Coal Company, a corporation duly organized and existing under the laws of the State of New York.

Defendant denies that he was the principal stockholder in said corporation.

Defendant admits that the transfer and conveyance of said lands to this defendant was consummated in Syracuse, N. Y., and thereafter said I. B. Merriam left the city of Syracuse, N. Y., and defendant verily believes returned to his home in the city of Chattanooga, Tennessee.

Defendant admits that the deeds above mentioned were shortly thereafter placed on record in the county of Cumberland, Tennessee, where said property is situated.

Defendant denies that the consideration expressed in the deed was a nominal consideration.

Defendant has no knowledge or information sufficient to form a belief as to whether or not said bankrupt has been in failing circumstances for some years prior to June 1st, 1903, or as to whether or not he has been solvent within the meaning of the bankrupt law or as to whether or not, for the last four years or five years, the assets of said bankrupt have practically remained the same as they were on or about the 1st day of June, 1903, or as to whether or not his stock of goods has continually decreased owing to his inability to secure credit and the necessity to meet the interest charges on the indebtedness which he was owing or for any other reason.

Defendant therefore denies each and every of said allegations.

Defendant admits that he has loaned the said I. B. Merriam various sums of money from time to time and has endorsed various notes of said bankrupt, but denies that he has been, or been understood to be, the financial backer of said I. B. Merriam.

Defendant has no knowledge or information sufficient to form a belief as to whether or not said bankrupt has had great difficulty in resisting the importunities of his creditors, in paying the interest charges on his debts at bank and otherwise, and to accomplish this purpose has had frequently occasion to borrow money from this defendant. Therefore this defendant denies said allegation.

Defendant denies that he was fully aware of the alleged condition of the financial affairs of said bankrupt, or that he fully knew that said bankrupt was largely insolvent or that at no time during the last three or four years would his property, at a fair valuation, pay at most more than forty or fifty per cent. of his liabilities.

Defendant therefore denies said allegations and each of them and the whole thereof.

Defendant has no knowledge or information sufficient to form a belief as to whether or not said bankrupt, for the purpose of gaining additional indulgence from his many creditors and to save himself from insolvent proceedings, has repeatedly and time and again during the last two years represented to his creditors that he was on the eve of selling his half interest in the coal lands in said petition mentioned at the price of $20.00 per acre or thereabouts and that if unduly pressed by his creditors he would be prevented from making said sale not only to his detriment but to their great loss, and that if permitted to take his own course he would succeed in disposing of said coal lands, and if in this he succeeded he would be able to pay off his creditors in full.

Defendant therefore denies said allegation and the whole thereof.

Defendant alleges that he has no knowledge or information sufficient to form a belief as to whether or not the creditors of said bankrupt relied upon the assurances of said bankrupt and in-
16 dulged him until the first of June last. Defendant therefore denies said allegation and the whole thereof.

Defendant admits that said bankrupt did make many and earnest efforts to sell his interest in said coal lands without success.

Defendant has no knowledge or information sufficient to form a belief as to whether or not, during the last two or three years, said bankrupt has renewed his assurances to the various creditors stating that he was about to sell his coal lands as aforesaid, and that if they would wait upon him and not bring suit that whenever said sale was consummated he would pay their demands.

Defendant therefore denies said allegation and the whole thereof.

Defendant emphatically denies the allegation in said petition which charges that said bankrupt was paid nothing by this defendant for making the transfer of said coal lands, and that said transfer was made wholly without a valuable consideration.

Defendant emphatically denies the allegation in said petition which alleges that the grant of conveyance of the coal lands to defendant, which is referred to in said petition, was had, made or contrived of malice, fraud, covin or collusion or with the intent or purpose to hinder, delay or defraud the creditors of said bankrupt of their lawful and just actions, suits, debts and acts, and said defendant further denies that the said deed is either wholly or in part null and void.

Defendant emphatically denies the allegation in said petition which charges that this defendant took said conveyance from said bankrupt well knowing the alleged fraudulent purpose and character thereof or with the intent to aid said bankrupt, to hinder, delay, or defraud his other creditors, to-wit, the creditors of said bankrupt in this cause.

Defendant denies in toto the allegation in said petition which avers that the said conveyance was collusively made for the purpose of defrauding any of the creditors of said bankrupt or for the special benefit of this defendant.

Defendant emphatically denies the allegation in said petition wherein it is averred that there was no cash paid at all in said transaction or that the consideration expressed in said deed or otherwise was a device in furtherance of covin, collusion and fraud whereby defendant and said bankrupt were contriving to hinder and delay the other creditors of said bankrupt, and this defendant
17 affirmatively avers that said conveyance was made in good faith and for a present fair consideration as will more fully be made to appear hereafter.

Defendant denies that reasonable value of the interest conveyed by said bankrupt to this defendant is the sum of $100,000.

Defendant denies that there was a secret agreement between said bankrupt and this def-ndant that this defendan*d* would give said bankrupt the sum of $75,000 for the latter's interest in said property,

and defendant affirmatively avers that there was no secret agreement of any kind between said bankrupt and this defendant.

Defendant denies the allegation of said petitioner that not one dollar of the purchase price or consideration for said transfer was paid by this defendant to said bankrupt, or that this defendant pretended to withold to his own use and benefit the said purchase price or the sum of seventy-five thousand dollars or that the same is now over due and unpaid.

Defendant denies that there is due to the estate of said bankrupt from this defendant the sum of seventy-five thousand dollars on account of the unpaid purchase price for said lands, or any other sum.

Defendant denies that he claims or has claimed that "while in fact he paid nothing to said bankrupt on account of the purchase of said property hereinbefore described, the agreed purchase price of seventy-five thousand dollars was appropriated in liquidation in claims or demands and that said defendant had against said bankrupt for money advanced to and endorsements made for said bankrupt. And that in this manner said defendant consumed for his own use and benefit the total of the purchase price of said property."

Defendant denies that he had reasonable cause to believe that his brother, I. B. Merriam, was insolvent or that he knew said I. B. Merriam was insolvent.

Defendant denies that by said transaction it was intended to give a preference to this defendant, and defendant denies that he actually knew that thereby he did in fact obtain a preference.

Defendant affirmatively alleges that he not only did not know that he was obtaining a preference over other creditors of his brother, I. B. Merriam, but that he had no reasonable cause to believe that said I. B. Merriam was insolvent. That he had no knowledge or suspicion that he was insolvent at the time of this transaction, but on the contrary, understood and verily believed that said
18 I. B. Merriam had money sufficient to pay all debts and demands owed by him.

Defendant denies that the Tennessee Lumber and Coal Company was organized by him at the time the transfer aforesaid was made, and denies that the same was organized for the purpose of taking title as quickly as possible to the property conveyed.

Defendant denies that he is the principal stockholder in said corporation.

Defendant denies that said corporation took title from defendant with full knowledge or with any knowledge of the alleged circumstances set forth in the petition herein.

Defendant admits that said Tennessee Lumber and Coal Company is a foreign corporation, but alleges that it has filed a copy of its charter with the secretary of the State of Tennessee at Nashville, Tennessee, and has filed an abstract of said charter in the register's office in the county of Cumberland, that being the county in which the lands in question are located.

Defendant further alleges that said company has complied in every respect with the requirements of the laws of the State of Tennessee covering foreign corporations, and is duly qualified and

authorized to take title to the property and to do business with said State.

Defendant further alleges affirmatively by way of defense to said petition that the facts concerning the transactions between this defendant and said bankrupt are as follows:

That this defendant has loaned from time to time since during or about the year 1892, to said I. B. Merriam various sums of money and has endorsed various notes for said I. B. Merriam.

That during the summer of 1897, the said I. B. Merriam executed and delivered to the trustee therein named for the benefit and security of this defendant a trust deed conveying all his interests in the lands mentioned in said petition herein for the sum of twenty-five thousand dollars which trust deed was executed, delivered and accepted as and for a complete and continuing security to this defendant for any and all sums of money which he might loan to said I. B. Merriam and as and for a continuing security to this defendant for any liability which He might incur by reason of endorsing notes or other commercial paper for said I. B. Merriam.

That thereafter and on or about the 11th day of April, 1889, said bankrupt executed and delivered to this defendant for the security of defendant another trust deed conveying the same property
19 which was and was intended to be continuing security for the benefit of this defendant for any endorsement which he might make for said I. B. Merriam and for any and all sums of money which he might loan him to the amount of $35,000.00 and interest.

And said deed was thereafter delivered by this defendant to the trustee therein named, in said month of April, 1899.

That this defendant loaned to and endorsed for said I. B. Merriam from time to time to the amount of $55,000.00.

That said I. B. Merriam had endeavored repeatedly to sell said coal lands, but without success. That during or about the month of December, 1902, defendant entered into an agreement with said I. B. Merriam, by the terms of which this defendant was to enter into possession of said premises and negotiate a sale of the same if possible, and out of the proceeds of said sale first pay himself the amount due for money loaned and take up such paper as he was liable on as endorser and for all of which he was secured by the trust deed aforesaid.

That in pursuance of said arrangement this defendant made a sale of said premises, took title thereto from said I. B. Merriam and out of the purchase price of $65,000.00 paid the debt to him, this defendant, and notes on which he was accommodation endorser in bank of Syracuse to the amount in all of $42,000.00, or thereabouts, and paid over to said I. B. Merriam in cash the sum of $25,032.00 or thereabouts. That after said transaction was completed, defendant was informed by his said brother, I. B. Merriam, that he was not going to have sufficient money to pay all of his debts and the defendant enquired of his said brother as to the amount he would require in addition and was told that he would require ten thousand dollars and that with said sum he could pay all his creditors and would be in comfortable circumstances and could keep his Chatta-

nooga real estate. That thereupon this defendant loaned to said I. B. Merriam the sum of ten thousand dollars in addition to the $25,032 which he has turned over to him out of the proceeds of said property.

Further answering the petition and bill of complaint herein this defendant affirmatively alleges that prior to the filing of the petition in bankruptcy herein he has no knowledge of the insolvency of said I. B. Merriam and has no reasonable cause to believe, and in fact did not believe or suspect that said I. B. Merriam was insolvent or not able to pay his just debts in full. That for the lands re-
20 ferred to in the petition herein this defendant paid a full, fair present consideration and obtained no unlawful preference over the other creditors of said I. B. Merriam and never sought to obtain any such unlawful preference. That the lands to which this defendant so took title were lands upon which this defendant had perfect security and a valid lien under and by virtue of the trust deeds hereinbefore referred to and as to which lands no other creditors had or could acquire any lien or title whatever.

Wherefore defendant prays that the petition and bill of petitioner and complainant herein be dismissed with costs and that it be adjudged that this defendant obtained no unlawful preference as against the creditors of said I. B. Merriam and that defendant obtained from said I. B. Merriam a perfect title to the lands described in the petition herein.

THOMAS MERRIAM.

BROWN & SPURLOCK,
Solicitors for Respondent.

(Here follows "Order Releasing Ten- Co." Filed Aug. 1, '03.)

No. 517.

H. F. ROGERS, Trustee in Bankruptcy of I. B. Merriam,
vs.
THOS. MERRIAM and THE TENN. LUMBER & COAL COMPANY.

Be it remembered that on this 1st day of August, 1903, before the Hon. Chas. D. Clark, Judge, etc., this case was presented upon the written stipulation of the parties; and the execution of said stipulation being admitted and established in open court, the same is ordered to be spread of record, and is in words and figures following to wit:

"It is agreed that the petition be dismissed as to the defendant Tennessee Lumber and Coal Company, the petitioner hereby releasing and abandoning any right to recover against said corporation and any right to impeach its title to the lands described in the petition, and conveyed to it by Thomas Merriam, agreeing to look to the personal responsibility of Thomas Merriam in lieu of
21 the land, but otherwise reserving all its rights against defendant Thomas Merriam and I. B. Merriam.

This dismissal and release is not to affect any grounds of recovery petitioner may have as against said two last named defendants, but

only to release the defendant corporation from any claim of liability and release any question as to its title to said land.

The dismissal of this bill as to said corporation is upon the condition that said Thomas Merriam does enter his appearance as defendant to this suit. It is further agreed that this stipulation is not to become binding until notice from petitioners that they are satisfied as to the solvency of said defendant and until the same has been submitted to the said Thomas Merriam and ratified by him.

This 11th day of July, 1903.

BROWN & SPURLOCK,
Att'ys for Tenn. Lumber & Coal Co.
PRITCHARD & SIZER,
WILLIAMS & LANCASTER,
Att'ys for Petitioner."

And it appearing to the court that the defendant Thos. Merriam, has, in accordance with the terms of said stipulation, filed his answer to the petition in this case, and that the petitioner, after due investigation, has agreed to release and abandon any right to recover against the defendant, the Tenn. Lumber & Coal Company, and any right to impeach the title of said corporation to the lands described in the petition and conveyed to said corporation by Thos. Merriam, and to look alone to the personal liability of the defendant, Thos. Merriam, it is now, in consideration of the premises and by consent of parties, ordered, adjudged and decreed by the court that the petition be, and the same is hereby dismissed as to defendant, The Tenn. Lumber & Coal Company, and that said defendant go hence.

And it is further ordered, adjudged and decreed by the court (the petitioner consenting as hereinbefore set out), the petitioner representing himself as trustee, and the creditors of the estate of I. B. Merriam, bankrupt, have no further charge, demand or claim against the said defendant, The Tenn. Lumber & Coal Company, or its estate.

Enter this.

CLARK, *J.*

O. K.

P. & S.
BROWN & SPURLOCK.

22 (Here follows "Deposition of J. B. Sizer," Filed April 15, 1904.)

H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM.

Deposition of J. B. Sizer, taken on behalf of petitioner, in the office of Pritchard & Sizer, Chattanooga, Tenn., on the 28th day of Dec. 1903, in the presence of Robert Pritchard and George D. Lancaster, counsel for petitioner, and A. W. Chambliss, counsel for defendant.

Said deposition is taken by consent of parties, formal caption being waived.

Q. 1. State your profession and where you practice it.
A. I am a lawyer and practice in Chattanooga, Tenn.
Q. 2. Are you a member of the firm of Pritchard & Sizer?
A. I am.
Q. 3. I will ask you to examine a paper which I now show you, which purports to be a contract entered into November 15th, 1902, by I. B. Merriam and G. H. Jarnigan, of the one part, and Thomas Merriam and W. Herbert Robinson of the other part, and state whether or not you drew that contract and whether it was executed in your presence and attested by you and Mr. Norris Headrick?
A. I did draw the contract referred to and the same was signed by the parties in my presence and I signed my name as attesting witness to the same in connection with Mr. Norris Headrick.
Q. 4. I will ask you to file the contract as exhibit "A" to your deposition.
A. I do so.
Q. State whether or not this contract is the only contract which those parties entered into with reference to the subject matter mentioned in it.
A. That is the only one that I know anything about or ever heard of except the deed which was subsequently executed in pursuance of this contract.

Further deponent saith not.
Cross-examination waived. J. B. SIZER.

23 Sworn to and subscribed before me this 28th day of December, 1903.
[SEAL.] NORRIS HEADRICK,
Notary Public.

Tax notary fee in bill of cost.

This contract, made and entered into this 15th day of November, 1902, by and between I. B. Merriam and G. H. Jarnigan, of Chattanooga, Tennessee, parties of the first part, and Thomas Merriam and W. Herbert Robinson, of Syracuse, New York, parties of the second part, witnesseth:

1. That the parties of the first part have contracted and agreed to sell unto the parties of the second part the two tracts of land in the

county of Cumberland, State of Tennessee, known as the Burke and Haley lands, being the lands granted by the State of Tennessee to Burke and Haley by grants numbers 23,822 and 23,823 each for 5,000 acres of land, to which grants reference is hereby made for a full and complete description of said lands.

2. The said parties of the first part further stipulate and agree to prepare and execute a deed conveying said real estate by proper description, reciting the consideration to be hereinafter stipulated, said deed to convey said property to such persons or corporations as the parties of the second part may direct, said deed to contain full covenants of seizen, warranty and against encumbrances and the same to be accompanied by a full and complete abstract of the title to said lands. Said deed is to be deposited in escrow with the Merchant's National Bank of Syracuse, New York, and is to be delivered by said bank to the parties of the second part or such persons or corporations as they may direct, on payment of the consideration hereinafter named.

The abstract of title to accompany said deed is to be delivered to the parties of the second part or their attorneys on demand.

3. The parties of the second part are to pay for said lands the sum of one hundred and fifty thousand dollars ($150,000) cash, or, at the option of the said parties of the second part, the sum of one hundred and twenty-five thousand ($125,000.00) cash and forty thousand dollars ($40,000) par value of the capital stock of the corporation to be hereafter created and organized for the purchase and development of the lands hereinbefore described. In the
24 event the latter mode of payment is adopted, the stock to be issued to the parties of the first part is to be fully paid up and non-assessable.

4. The said purchasers are to have six months from the date of this instrument in which to pay said purchase money; but they are to pay the sum of ten thousand dollars ($10,000) within sixty days from this date, and in consideration of their making said payment at that time the said parties of the first part agree to pay interest on said ten thousand dollars, from the date of payment to the expiration of said term of six months, at the rate of six per cent. per annum. In the event all or any part of the balance of said purchase money is paid before the expiration of said six months, the purchasers are to be allowed interest on the amounts so paid from the time of payment to the expiration of said six months' term at the rate of 4 per cent. per annum.

5. All payments made to the parties of the first part under this contract shall be made one-half to I. B. Merriam and one-half to G. H. Jarnigan.

Executed in duplicate the day and date above written.

I. B. MERRIAM.
G. H. JARNIGAN.
THOMAS MERRIAM.
W. HERBERT ROBINSON.

Attest:
NORRIS HEDRICK.
J. B. SIZER.

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

In re I. B. MERRIAM, Bankrupt.

Petition of H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM ET AL.

The deposition of Chas. A. Lyerly, H. F. Rogers, H. B. Case, R. T. Wright, Robert Pritchard and Ernest Scholze, taken on behalf of the petitioner in this cause, at the office of Williams & Lancaster, Temple Court, Chattanooga, Tennessee, on the 18th day of December, 1903, by consent of the parties, in the presence of Robert Pritchard and George D. Lancaster, attorneys for petitioner, and A. W. Chambliss, attorney for Thomas Merriam.

25 It is agreed between the parties that all exceptions to the evidence in this cause, instead of being stated before the Commissioner, may be made before the Court on the hearing; and the formalities of caption and certificate are hereby waived. The signatures of the witnesses are also waived.

Mr. CHARLES A. LYERLY, the first witness called, being duly sworn, deposed as follows:

(Examined by Mr. LANCASTER:)

Q. How long, and in what capacity, have you been connected with the Chattanooga National Bank?

A. I have been its president since its organization in 1887.

Q. The Chattanooga National Bank is located in Chattanooga?

A. Yes, sir.

Q. How long have you known the bankrupt in this cause, I. B. Merriam?

A. I have known Mr. Merriam about fifteen years.

Q. Has I. B. Merriam or the firm of Merriam & Son ever had a deposit account with your bank?

A. They have not.

Q. Have you been acquainted with the financial credit of Mr. I. B. Merriam in this city for the last three or four years?

A. I have not, except in a general way.

Q. From your general knowledge of his financial credit, please state whether or not it is good or bad?

A. I think for the past six or eight years his credit has not been good—not with us.

Q. Has your bank ever loaned him any money directly on his straight paper?

A. We have not.

Q. When did the Chattanooga National Bank buy out the Third National Bank of this city?

A. In May, 1902.

Q. State whether or not, in taking over the assets of the Third National Bank in the purchase, your bank took with it certain paper made by I. B. Merriam and endorsed by his brother, Thomas Merriam, the defendant in this cause?

26 A. Yes, sir; it did.

Q. Please file with this, your deposition, and mark it Exhibit "A" a statement, as shown by the books of the Chattanooga National Bank, of such paper as was taken at that time by the Chattanooga National Bank, the dates of the paper, the amounts of the notes, and the history of that paper, the renewals, when paid and how and by whom paid?

A. I have that statement and file it herewith as requested.

Q. Is this statement a correct statement of the books of the Chattanooga National Bank?

A. It is.

Q. After taking this paper, state whether or not your bank made any requests for payment on Mr. I. B. Merriam, or made any effort in the way of urging him to pay the paper?

A. We made requests in every instance as the paper matured, and in several instances, as the statement will show partial payments were made.

Q. State whether or not you had any conversations with Mr. I. B. Merriam in reference to his coal lands in Cumberland County, and what representations, if any, he held out in reference to the lands, and what promises, if any, he made to the Chattanooga National Bank whereby he sought to obtain renewals?

A. He stated to me that negotiations were pending for the sale of that property; that he expected them to be consummated at almost any time. He told me that the sale had been made and they were only waiting to close up the papers.

Q. Did he state to you at any time that there was a trust deed, or secret mortgage on that property in favor of his brother Thomas Merriam?

A. He did not.

Q. When did you first learn of that?

A. When he filed his petition in bankruptcy.

Q. Did he represent to you specifically whether that property was encumbered or unencumbered?

A. No, I never asked him exactly. He stated to me that when he made the sale he would be able to pay up everything he owed.

Q. I notice in the statement filed as Exhibit "A" to your depo-
sition, note No. 1 on that statement, in the sum of $1,500
27 and bearing date of June 6, 1902, payable 90 days after date, that on the 6th day of September, 1902, $500 of that note was paid, and the balance renewed for 60 days; how was that $500 paid?

A. I don't just remember now, but my recollection is that he gave us a draft on his brother for it.

Q. This statement shows that it was paid by Thomas Merriam; is that correct?

A. If the statement shows that, it is correct.

Q. This statement also shows that this balance of $1,000 on that note was reduced by a payment of $250 on January 2, 1903; how was that $250 paid?

A. I believe by a draft on Mr. Thomas Merriam; I am not positive, however.

Q. I notice that the fourth notes on that list was in the sum of $1,000 and bears date of April 25, 1902, for 90 days, and was renewed from time to time until November 21, 1902, when $500 was paid; state how that was paid?

A. I think that was paid by draft on Mr. Thomas Merriam of Syracuse.

Q. State when the balance of these notes were paid. The record shows that they were paid about the first of June; is that correct?

A. It is.

Q. Who paid the notes?

A. Mr. Merriam I think. That note had been reduced to $500 and that payment was made after the sale and at the time stated in the statement.

Cross-examination.

(By A. W. CHAMBLISS:)

Q. Captain, do you know Mr. Thomas Merriam?

A. I do not.

Q. Did you have any correspondence with him at any time in regard to these matters?

A. I wrote him a letter stating that on the maturities of these notes we would expect him to pay, as his brother seemed unable to do so.

Q. When was that letter written?

A. I can not now give you the exact date.

Q. Have you a copy of that letter? If so, please file it as Exhibit "B" to your deposition?

A. I will file it.

Q. Did you ever have any letter from Mr. Thomas Merriam?

28 A. He never replied to any of my letters. I stated that I would furnish that letter; I am quite sure that I have it. The stenographer keeps copies of all letters and I suppose that one is there.

Q. You say Mr. I. B. Merriam never made you any representations as to encumbrances on the property one way or the other?

A. Yes, sir.

Q. And all the indebtedness held by you was, in fact, paid by Mr. I. B. Merriam, or by drafts on his brother?

A. Yes, sir.

And further this deponent saith not.

Sworn to before me this 18th day of December, 1903.

[SEAL.] BRUCE FORSHEE,
Notary Public.

EXHIBIT "A" TO DEPOSITION OF CHAS. A. LYERLY.

List of notes made by I. B. Merriam and endorsed by Thomas Merriam and taken in June, 1902, by the Chattanooga National Bank from the Third National Bank, also a history of their renewal and payment.

1st. 76562, June 6, 1902, 90 days, $1500.00. Paid September 6th, $500.00; by Thomas Merriam, renewed for $1000.00; September 4th for 60 days, renewed November 3rd for 60 days, $1000.00; January 2nd, 60 days, $750.00; March 3rd, 60 days, $750.00; May 2, 30 days, $750.00; paid in full.

2nd. 76564 May 12, 1902, 90 days, $1000.00; renewed—77879 August 11, 60 days, $1000.00; renewed—79171 October 10th, 60 days, $1000.00; renewed—80431 December 9, 60 days, $1000.00; renewed—81699 February 7th, 1902, 60 days, $1000.00; renewed—83451 April 8th, 30 days, $1000.00; paid June 5th, in full.

3rd. 76565, May 10, 1902, 90 days, $1000.00; renewed—77828 August 8, due October 7, $1000.00; renewed—79110 October 7, 60 days, $1000.00; renewed—83390 December 6th, 60 days, $1000.00; renewed—81651 February 4th, 60 days, $1000.00; renewed—83642 May 4th, 30 days, $1000.00; paid June 3rd, 79566 April 25th, 90 days, $1000.00; renewed.

4th. 77533 July 24th, 60 days, $1000.00; renewed—78750 September 23rd, 60 days, $1000.00; renewed—80224 November 21, 90 days, $500.00; renewed—81952 February 19th, 60 days, $500.00; paid June 6th.

29 EXHIBIT "B" TO DEPOSITION OF CHAS. A. LYERLY.

AUGUST 14TH, 1902.

Thos. Merriam, Esq., Syracuse, N. Y.

DEAR SIR: We hold here bearing your endorsement, the following paper, *i. e.*:

Merriam & Son, due September 4th, $1500.00; I. B. Merriam, due September 22d, $1000.00; Merriam & Son, due October 7th, $1000.00; Merriam & Son, due October 10th, $1000.00.

We wish you to take notice, Mr. Merriam, that payment of these notes will be required as they mature.

Yours truly, CHAS. A. LYERLY, *President.*

EXHIBIT "C" TO DEPOSITION OF CHAS. A. LYERLY.

Copy.

SEPT. 4TH, 1903.

Thos. Merriam, Esq., Syracuse, N. Y.

DEAR SIR: We are sending to the —— Bank of your city, for collection Merriam & Son's draft on you for $500.00. On receipt of returns the proceeds will be credited on Merriam — Son's note for $1,500 bearing your endorsement, said note bearing this date.

This note is given us to pay one of the same amount due today that bears your endorsement. We decline to accept renewal of this paper in full, hence the draft of $500 is made on you, so as to reduce the renewal to $1,000.

Prompt payment of this draft is desired.

Respectfully, CHAS. A. LYLERLY, *Pres.*

N. B.—Our object in writing is that you may treat it as a receipt for $500 on the $1,500 above referred to, when of course, the draft is paid.

30 *Deposition of H. F. Rogers.*

H. F. ROGERS, the next witness called, being duly sworn, deposed as follows:

Examined by Mr. LANCASTER:

Q. Mr. Rogers, are you the Trustee and Petitioner in this cause?

A. I am.

Q. Please file a written statement, and make it Exhibit "A" to this your deposition, showing the assets, both real and personal, of the bankrupt estate, and what was the amount of liabilities owing by the bankrupt, and which of these liabilities were secured by liens on the property, and of what kind, and what is now the amount and extent of the unsecured claims against the estate. I wish you would show also in this statement the appraised value of this property, what has been done with the property and what has been realized from it?

A. I file herewith the statement and Mark it Exhibit "A" as requested.

Q. Please state by whom this appraisement was made—who was the committee appointed by the Court?

A. N. I. Mayes, George W. Clark, and J. C. Estes.

Q. In what business are these gentlemen engaged?

A. They are engaged in the real estate business, all of them.

Q. State whether or not there is anything going to be realized from the sale of the undisposed-of real estate?

A. There will be very little, if anything.

And further this deponent saith not.

Sworn to before me this 18th day of December, 1903.

BRUCE FORSHEE,

[SEAL.] *Notary Public.*

EXHIBIT "A" TO DEPOSITION OF H. F. ROGERS.

Preferred debts of I. B. Merriam, secured by mortgage, deed of trust and otherwise.

No. 1. Lot 80 x 275 feet on Vine St. (Homestead) appraised value, $6,500.00.

Morgage secured G. H. Jarnigan, debt, interest and taxes, $5,465.00. Balance $1,035.00.

I understand that an agreement has been entered into between I. B. Merriam and his creditors that the remaining equity
31 in above property shall be set aside to him as a homestead.

No. 2. The south 25 feet and the north 25 feet of lot 59 and 61 Chestnut St. was appraised at $20,000.00. The south half of the north half of lot No. 19 Market St. at $1,000.00. Total $21,000.00.

Mortgage, debt, interest and taxes to Penn Mutual Life Co., and first National Bank, $19,828.50.

Surrendered to the Insurance Co. and Bank in satisfaction of their debt by order of the bankrupt creditors.

No. 3. 9 lots Coker's addition to Hill City appraised value, $650.00. 27 lots in Curtis addition to Chattanooga, appraised value, $4,275.00; 3 lots in Wollhoits addition to Chattanooga, appraised value, $1,800.00. Total, $6,725.00.

Mrs. S. O. Vann, held deed of trust against said property for debt, taxes and interest for $6,655.00. Said property was surrendered by order of the creditors to Mrs. S. O. Vann, and the same was foreclosed under said deed of Trust and left a balance due Mrs. S. O. Vann, of $2,697.52, which has been filed as a general claim against said bankrupt estate.

No. 4. 3 lots in Willhoits addition and 35 lots in Peyer's Addition, appraised value, $4,675.00. Incumbered by deed of trust to secure Gus Cate, debt interest and taxes $2,891.00.

By request of Mr. Cate, the Trustee in Bankruptcy was ordered to advertise and sell the above property after removing the clouds thereupon and as directed, he has advertised said property for sale for cash on the second day of January, 1904, and he is unable to state whether or not the property will any more than satisfy the debt of Mr. Cate.

No. 5. Lots No. 38 and 40 Montague's addition, city appraised value $3,800.00. Mortgage to secure Bank of Chattanooga, debt interest and taxes, $4,600.00. The Trustee was ordered to relinquish said property to said bank.

No. 6. Lots 79, 80, and 81 North Chattanooga Land Company's Addition, Hill City, appraised value $450.

On investigation, I find that these lots were allot-ed to the bankrupt in consideration of certain stock that he held in said Land Company, which stock he had hypothecated with the First National Bank and others, and in reality owned no interest in said lot.

No. 7. 100 acres more or less located Bradley County, Tennessee, appraised value $200.

32 Said lands are advertised for sale January 2nd 1904.

The general claim against the bankrupt estate filed with the referee to this date amounts to about $41,000.00.

The personal assets are as follows:

Stock of Merchandise and fixtures, appraised value, $1,183.41; fixtures, appraised value, $103.05. Total, $1,286.46.

I sold the entire stock and fixtures for $1,000.00, in cash.

Notes and accounts due the bankrupt, amounted to about $21,000.00, that came into my hands, all of said notes and accounts

with the exception of about $1,600, are worthless and cannot be collected by process of law or otherwise. They have been carried on the books of the bankrupt for a number of years and most of them are barred by the statute of limitation. I have collected about $1,200.00 of said accounts and cannot be able to realize very much more from them.

This statement cannot be treated as absolutely correct, but only approximately so. I am inclined to believe that there are other general claims that will be hereafter filed against said bankrupt estate.

Respectfully submitted,

H. F. ROGERS, *Trustee.*

Deposition of H. B. Case.

H. B. CASE, the next witness called, being duly sworn, deposed as follows:

Examined by Mr. LANCASTER:

Q. Colonel, how long have you been a member of the Chattanooga Bar?

A. Since twenty-nine years ago last June.

Q. How long have you known the bankrupt in this cause, I. B. Merriam?

A. Ever since he came here from Alabama; I don't know how long that is. About 1881, I judge.

Q. State whether or not you, as an active practicing attorney, during the last four or five years have had occasion to investigate the financial condition of I. B. Merriam, or Merriam & Son, and if so, what was the occasion for this investigation, and what was the result of it?

33 A. I represented the Martindale Mercantile Agency for eight or nine years, and part of its system is reporting the financial condition of business houses. I had occasion to look into their condition when I first became a representative of the Martindale Association. I kept close track of them from that time until they filed the petition in bankruptcy.

Q. What did you find was the financial condition of the bankrupt, and the credit to which he would financially be entitled to in the mercantile world?

A. For some years I reported them as worthy of credit, especially before the dissolution of the firm of Merriam & Storey. I continued to do so for some time afterwards. I believed in Mr. Merriam, believed he was a square and honest man, and I wanted to do the very best I could for him; but his stock began to diminish, and through his endorsements for Willhoite and other unfortunate matters, Mr. Merriam's real estate here in the city was encumbered to protect his creditors to whom he was indebted. So, I had to begin, some two or three years ago, to advise the Mercantile subscribers that they should limit their credits and press for collections, and get on to a

balance sheet and quit. That has been my advice to subscribers for two years past.

Q. State whether or not, during the last two or three years, you have had claims for collection against I. B. Merriam?

A. I think for two years previous to the bankruptcy proceedings, I had a claim on an average of once a month, perhaps more. That is my recollection; my records would show exactly how many.

Q. State whether or not you had difficulty in making collections, and whether he was slow in payment?

A. In that two years' time I never had a single claim paid when presented. It was always put off two weeks or three weeks, and very frequently it would be put off ten days again, and sometimes it would be put off a third time, and then I threatened to sue, and once or twice I brought suit.

Q. State whether or not in persuading you to give him time, Mr. Merriam made you any representations about his property, and especially in reference to any coal lands in Cumberland County, and what these representations, if any, were?

A. Mr. Merriam was always very frank to say that his real
34 estate in the city was encumbered, and that, except for his coal interests, he would not be able to pull through.

Q. State whether he represented to you from time to time he was making any efforts to sell the coal properties, and what were the prospects for making a sale?

A. I think all the time for the two years last past he was making efforts to sell that coal interest. He always told me he was, and a number of times told me he had the sale about consummated, and believed he would close it within a few weeks and when he did it would put him out of debt and on his feet once more.

Q. State whether or not he ever told you at any time that the Cumberland County coal property was encumbered by a secret deed of trust or mortgage in favor of his brother, Thomas Merriam, the defendant in this cause?

A. No, sir; he did not.

Q. When did you first learn that that property was so encumbered?

A. After he returned from Syracuse, where he had gone to close up the trade for his coal lands.

Q. State whether or not, during the month of May or April of the present year, just prior to the time——

A. I want to add one thing more to that. He told me more than once, twice or three times that that was the only property he had that was unencumbered, and used that as an argument why I ought to be lenient with him and give him a little time on those claims.

Q. Now, Colonel, in going to his store during the last year or two, and especially during the last year, what did you observe was the condition of his stock of goods; that is, the extent to which he had goods on hand, and whether in large or small quantities, and what was the appearance of things around his store?

A. The reason I first began to report to the Martindale patrons that they should use great caution was because I observed the supply

of goods in the store was diminishing and I observed from time to time that the goods were growing less, up to the time the sale of the coal lands was made. Then I talked with Frank Merriam as to how many goods they had there; and he said he supposed about $2500 worth. Three years before I had reported them, on what I supposed to be pretty good authority, as having $10,000 of stock.

Q. State whether or not this small stock of which you speak of them carrying during the last year or so was manifest in appearance to any one entering the store?

35 A. It was to me, and I suppose it ought to be to anybody.

Q. State whether or not, during the month of April or May of the present year, just prior to the closing of the sale of these coal lands, you had any claim or claims against I. B. Merriam or I. B. Merriam & Son which you sought to collect, and what efforts you made to collect this claim or claims, and what passed between you and I. B. Merriam with reference thereto, prior to the sale and immediately thereafter?

A. I had, within two months previous to Mr. Merriam's going to Syracuse, I think three claims; one of them, however, I think was received before the beginning of the two months, and by giving them notice and going after it two or three times, one of them was paid, perhaps four or five weeks before Mr. Merriam went East. Another one, a small claim of some $39.00, as I remember, I had four or five weeks, and I had three or four promises of fixed time when it would be paid. When Mr. Merriam was about to start East, he directed his son, Frank, to pay that the next Friday, as I remember, just five or six days after he left. Anyhow, that was paid by Frank in two dribs. I think I presented the claim and a check was given for it which was dishonored and I went back and Mr. Merriam said if I would wait until the next week Frank would pay it, and he did pay a part of it one time and a part of it another while Mr. Merriam was away. The third claim which I had is a claim I have filed in the bankruptcy proceedings for $135.00 for Franklin & Sons of New York. I talked with Mr. Merriam about that; it was the last claim to come to me, and he said he could not pay it then and asked me to wait a couple of weeks. This was on Tuesday and he wanted that I should wait until a week from the next Saturday. I always felt so kindly to Mr. Merriam that I never refused when he asked me these favors. I waited and went back to him, and he said he could not pay then, but to wait until the middle of the next week, I think Tuesday of the next week, and he would pay it. I went, according to his promise, to see him, and he then informed me that the sale of his coal lands had been accomplished, and he had a telegram which he showed to me and read to me, requesting him to come to Syracuse and close up the transaction, and he said to me: "I go to-morrow morning; you hold that until next Thursday and I will be back here and pay that claim sure. This sale puts me on

36 my feet."

"Well," I said, "I hope it does; you know I have been very indulgent, because I believed in you. How much do you get out of it?"

"Well," he says, "We get $125,000 for the property."

I said: "Do you get $62,500?"

"No," says he, "I get more than Jarnagan does. Jarnagan was willing to sell for less than I was. He gets $50,000, and I get $75,000."

I said, "Well, that ought to put you on your feet and out of debt."

"Yes," he says, "that will fix me all right and I will pay your claim next Thursday."

I went over Thursday. He had returned, but said he could not pay it yet. "Well," I said, "haven't you got it closed up?"

"Well, yes; in a way," he said; "but I will pay you next Saturday."

I went back on Saturday, and he said: "I will pay that Monday; next Monday."

I went back on Monday, and he said: "Now, if you will wait until Wednesday, if I don't pay it, you may sue or do what you please." On Tuesday he filed his bankruptcy proceedings.

Q. State whether or not prior to leaving for New York — made to you any statement in reference to the fact that he hoped or expected to bring back the purchase money?

A. He said distinctly that he would be back with that purchase money; that was his promise and the reason I didn't sue him then.

Q. When you saw him immediately after his return state whether he made any statement in reference — whether he had or had not brought back the money; and if so, if he made any explanation?

A. He made no explanation to me. He just said he couldn't pay it then.

Q. And made no further explanation?

A. No, sir.

Cross-examination.

(By Mr. CHAMBLISS:)

Q. Colonel Case, Mr. Merriam was president of the City Savings Bank for a number of years, was he not?

A. I so understand.

37 Q. And prior to the time you speak of, recent years, he stood very well financially here and was regarded as having a good deal of property, did he not?

A. He had considerable property and I regarded him as being perfectly trustworthy.

Q. His reputation in the community, prior to filing his petition in bankruptcy, for reliability as a man and trustworthiness has been excellent has it not?

A. His character for honesty and integrity has been exceedingly good. He has been regarded as very slow pay for the last two or three years. He was regarded as very slow by the banks and the business community.

Q. But it was generally understood, was it not, that he had invested largely in real estate and diverted funds from his wholesale business in connection with these real estate transactions, was it not?

A. I don't know that I can answer that by yes or no; but my understanding is that his first misfortunes came from endorsing for J. M. Willhoit, and his next misfortune came through irregularities with his partner in business. That is my understanding from what he told me himself, and that occurred before the firm of Merriam & Son began business. It is probable that your question should be answered affirmatively in this, that, as I understand from him, he diverted some of his money to buy coal lands; but of this I am not sure; it may be so or it may not.

Q. The popular idea has prevailed in this community, certainly up to a very recent date, that Mr. Merriam was a well-to-do man and owned a good deal of property?

A. Yes, I think prior to the bankruptcy proceedings he was regarded as a man of considerable wealth, and I have heard him say himself that he gave a great deal of money towards the erection of the Baptist Church. At that time he was regarded as having plenty of money.

Q. The impression upon your mind was that if Mr. Merriam realized anything like $75,000 from his real estate that would do for him what he said: It would put him on his feet in good shape?

A. I thought so. I did not think he owed more than that, from what I could learn, and he led me to believe it was all to be used for the purpose of paying him out of debt.

Q. He seemed very much pleased over the prospect of consummating the sale on that basis, did he not?

38 A. Before he went away, yes, sir; and I felt very hopeful for him; but he did not seem so well pleased when he came home. He was then very reticent and did not give me an explanation.

Redirect examination:

Q. Prior to the bankruptcy in this cause, did you know the extent of I. B. Merriam's indebtedness to his brother, Thomas Merriam?

A. I never knew anything of it.

Q. Is the City Savings Bank in existence in this community now?

A. No, sir.

Q. What became of it?

A. It was liquidated, as I undersand it of its own motion; it paid off its depositors.

Q. How long ago was that, Colonel?

A. I think they began liquidation 10 or 12 years ago.

Q. To refresh your memory, Colonel, did not the City Savings Bank make a general assignment for the benefit of its creditors?

A. Yes, sir; but they did it voluntarily, as I understand it.

Q. State whether or not I. B. Merriam ever occupied any official position of trust and prominence? He has been mayor of the city, has he not?

A. Yes, sir.

Q. When was that?

A. I suppose in 1890 or 1893. Somewhere along about that time, I think.

And further this deponent saith not.

Sworn to before me this 18th day of December, 1903.
[SEAL.] BRUCE FORSHEE,
Notary Public.

Deposition of R. T. Wright.

R. T. WRIGHT, the next witness called, being duly sworn, deposed as follows:

(Examined by Mr. LANCASTER:)

Q. How long have you been a member of this bar, Mr. Wright?
A. Eleven years.
Q. As a practicing member of this bar, you have done considerable collecting during that time have you not?
39 A. Yes, sir; I have made that my chief business.
Q. State how long you have known I. B. Merriam, the bankrupt in this cause?
A. For 15 or 16 years.
Q. State whether or not during the last 7 or 8 years you have, as an attorney, had claims against I. B. Merriam or I. B. Merriam & Son for collection?
A. Yes, sir; I have a considerable amount of claims against him.
Q. Have you had any during the year preceding his bankruptcy?
A. Yes, sir.
Q. When did you first learn of the fact that there was a secret mortgage given by I. B. Merriam to his brother, Thomas Merriam? That is, a mortgage on the Cumberland County coal lands.
A. I first knew that after he filed his petition in bankruptcy.
Q. State whether or not, prior to that time, and while seeking to collect claims from I. B. Merriam, he, at any time, ever made to you representations in reference to the Cumberland County coal lands, as to whether they were encumbered or unencumbered; and what inducements, if any, he held out to you for delay in collections and credit, and what possibilities of payment he held out and on what did he base those possibilities?
A. Some time last year I received a claim for collection against Mr. Merriam, in the guardianship of the Bryan heirs, where he had been appointed by our County Court. The minor children had gone to Middle Tennessee, and a guardian had been appointed in Franklin County, according to law, and I asked for his removal here and that a settlement be made in the County Court. That was one claim I had against him for collection in 1902 and 1903. I also had a claim for borrowed funds from W. J. Poe amounting to $1100 or $1200. Having these two claims in my hands for collection, I had a good many conversations with Mr. Merriam, and was all the time put off by Mr. Merriam with promises that it would only be a very

short while until he would receive some $50,000 to $65,000, and at one time I understood it to be a considerable larger sum than that, that he was to receive for the sale of the mountain lands that you mentioned. I was put off so many times in this matter that I began to get doubtful of the matter and told him so several times
40 in my office just before his bankruptcy and then he referred me to the firm of Pritchard & Sizer and told me if I did not believe I was going to get every dollar of my claims and that he was not going to pay all his debts, and would get enough to do that and leave him on his feet so that he could continue his business, that I could talk with them, and they would assure me of the same facts. I did talk with them, and Mr. Merriam came to Pritchard & Sizer's office with me, and they told me that the sale would be made and that Mr. Merriam would receive a considerable sum of money. Mr. Merriam told me that mine would be the first claims paid as soon as he received the money. The day he started on to New York to get the money he came to me and told me that he would be back in a few days with the money. His bondsmen in the guardianship matter were about to bring suit against him and he said that he would be able to settle that as well as all his other obligations in full as soon as he returned. He said the money was there coming to him and that he would get every dollar and would be able to pay all he owed. He never at any time mentioned to me that there was any secret mortgage, but on the contrary told me this money was coming to him and he would get it; and one time at his store on Chestnut street, about three weeks before he went on to New York to get this money, he told me he did not think it would be necessary for him to go on there; that he thought vouchers would be sent here in a few days and he expected to have enough to pay everything he owed. The amount ranged, as I said from $50,000 to $65,000. He said he would have more than enough to pay everything, and he made the remark that he would be able to walk the streets with as easy a conscience as any man; that he would not owe any man in the world.

Q. What connection did the firm of Pritchard & Sizer have with this matter?

A. They were preparing the deeds to this property. The papers were being drawn, and in some way I think they represented both parties in drawing the necessary papers and for passing on the titles for the parties that were buying.

Q. What representations did they make to you?

A. That the title was in I. B. Merriam; that there was nothing against it at all, and that they saw no reason why the statement made to me was not absolutely true; that Merriam would
41 get the sum of money he said; that they had claims against him themselves and also attorneys' fees which they were satisfied they would get as soon as the property was sold and they advised me to hold up on my claims.

Q. Did Mr. Merriam make to you the statement, or not that the lands were unencumbered and that he would get the money for their sale?

A. He did. I asked him directly. I said: "Half the time in cases like this a person is owing on the land half as much as he will get for it; are you sure these lands are clear?" He told me there was nothing against it and that I might ask Pritchard & Sizer about it.

Q. Did you see Mr. Merriam after his return from New York and seek to collect this money from him?

A. I tried to see him, but never got to. I went to his store, and they told me he was at home; I telephoned him and they said he was not there. I tried as hard as any man in the world to see him. I hunted for him for three or four days as diligently as any man ever hunted another, because I heard he had returned and that the land had been sold, and I supposed he had in his possession $50,000 or $60,000 and would pay the two claims I held amounting to about $2,000. Naturally I was very anxious to get the money for my clients because the matter had been so delayed and they were blaming me for not bringing suit against his bondsmen; also, incidentally, I wanted my fees in the matter.

Q. Have you had occasion to visit the store of Merriam & Son on Chestnut St. during the last year?

A. Yes, sir; very often.

Q. State what you saw in going there in reference to the size of the stock on hand; whether the stock was large or small, and what impression the appearance of that stock made on you?

A. The appearance of the stock was very bad. I having once been a groceryman myself could judge of about what a wholesale man ought to keep in stock. He had piled up right in the entrance of his store, right in front, a great many boxes of canned goods which I knew to be of very little value at all—baking powder and such things. I noticed the absence of the leading staple things which cost considerable money, such as coffee, teas and fine bottled goods. I often wondered how he was able to run a wholesale grocery store
42 with the class of goods he had on hand; and, on making investigations, I found he practically was not doing any good in the wholesale business. He had no goods to fill orders and if he filled orders he had to go out and get the goods to do so—had to get them from hand to mouth, so to speak.

Q. Were you acquainted with Mr. Merriam's financial credit during the last year or two, and if so, what was it?

A. It was very bad.

Cross-examination.

(By Mr. CHAMBLISS:)

Q. His store you speak of on Chestnut Street was quite a large building?

A. It was very large. It was a very wide building—not so long, but there was a very large floor space.

Q. He had two aisles running through these piled up goods, running back to the rear of the store, did he not?

A. Well, yes, sir; you mean a passage between the goods, I suppose. That is true.

Q. Did you undertake to make any estimate at any time of the value of the stock he was carrying?

A. No, sir; not any more than an estimate in my mind as to the smallness of the stock for a man to be attempting to carry on a wholesale business.

Q. Did you conclude from what you saw that by piling these boxes and packages as he was doing he was thereby holding out the representation that he had a large stock of goods on hand, or larger than he really did have?

A. It is a rule with grocerymen, when short of stock, to put up everything in front of the store; and I noticed that was done in this instance. When you walked into the store and on first going in the door, you would imagine you were going in a well supplied store, but would soon see you were out.

Q. It was easy for you, who had had experience, to ascertain by a little examination that there was not a sufficient stock?

A. Yes, sir; and from the reports I had and the investigations I made, having these claims for collection against Mr. Merriam. I not only had the two claims I have mentioned, but 20 or 30 little
43 bit of claims for bills of goods from St. Louis, and he not meeting these small matters, I wanted to know the reason why and then I found that he had no goods in his store, though he apparently traveled men and advertised and held himself out as one of the leading grocers of the town.

Q. You understood, and it was generally understood, that Mr. Merriam owned the store property in which he did business, and also owned considerable other real estate scattered around through the city?

A. I knew he did not. I had taken up the matter of these two claims, and having them in the process of collection, had made investigations and found that he practically owned nothing in the town; that while ostensibly the owner—the equitable owner you might say—everything was encumbered except a few Hill City lots that he once tried to get me to take a deed of trust on to secure his debt to Poe and I refused to do so.

Q. That information you derived as the result of investigations which you made?

A. Yes, sir; and general reports.

Q. He was, however, the ostensible owner of considerable property in the city?

A. Well, yes, sir; but by the reports, as I say, he did not own it in his own name. It was encumbered by mortgages against it to its full value. I am also, and have been, a member of Dunn's Commercial Agency and of course would get reports there, though I never made it a rule to rely absolutely on these reports. When I got claims I made investigations for myself.

Q. Did you know from these reports, or do you now recall whether these reports gave him a substantial line of credit?

A. They did not. The reports from the last few years have been very bad indeed.

Q. Are you sure these reports did not give him a line of credit of from $30,000 to $50,000?

A. I would not say. I never asked for a detailed report from Dunn's Agency as a man would who wanted to sell goods. The reports I would ask them for was something as to his net worth that I might use in arriving at some basis as to whether I could make the claim or not.

Q. The Dunn Agency publishes and issues semi-annually books showing the credit of parties engaged in a commercial business, does it not?

A. Yes, sir.

44 Q. Do you know whether or not these books give him a line of credit of from $30,000 to $50,000?

A. I have never referred to one of those books in my life, though I have had them in my office. I am only a member for the purpose of asking for information and of inquiring about parties whom I do not know or who are not here or when I couldn't get what I wanted myself. I never referred to the books though I always kept one in my office.

Q. From the information you got, Mr. Wright, you were led to believe that if Mr. Merriam got from $50,000 to $65,000 for the sale of coal lands he would be put in good shape, as he claimed he would be?

A. He told me that himself; that he would be able to pay up all his debts and go on with his business in first-class style.

Q. That was your belief, was it?

A. After his telling me that so positively and referring me to Pritchard & Sizer and they assuring me of the sale of land and that there would be no reason why he would not get the money, and Merriam's assertion that he would pay all he owed and have a nice surplus, I, of course, believed it.

Q. Did Pritchard & Sizer inform you of a mortgage which the Chattanooga Savings Bank held against that property?

A. They never did.

Q. Did they inform you of any claim against it on account of the purchase money, to satisfy Wright and other parties at Rockwood?

A. No, sir.

Q. You are quite sure then that they represented to you that there were absolutely no incumbrances against the property?

A. Yes, sir, and not only that, but Mr. Pritchard showed me a letter in which there was something about it. I don't remember the contents of the letter that Mr. Pritchard read or Mr. Merriam read and showed to me, saying there was nothing against the land; that the title was clear. I went still further and went to Mr. Jarnagan, Mr. Merriam's partner, and he assured me there was no doubt about it; that Merriam would get the money and was satisfied that the money was coming in right away.

Q. Mr. Merriam himself seemed to feel that if the sale was made it would put him on his feet?

45 A. I don't know how he felt.

Q. From his appearance and conduct, how did he seem to feel about it?

A. If he did not feel that way, he was acting very queer. I can not tell how a man feels; he may simply have been telling me that to hold me off, or he may have believed it.

Q. My question was not as to how he felt, but as to how he seemed to feel.

A. He seemed anxious to have the sale go through. He wanted to get the money. At least, it always seemed to me that way.

Q. Prior to this trouble how did Mr. Merriam stand in the community as to integrity and honesty? What was his general reputation?

A. Up to several years ago Mr. Merriam stood well. If I remember correctly, I thought so much of the man that, years ago, when I was a country merchant, I loaned him considerable money, which he paid to me. I was then a large customer of Merriam's and bought thousands of dollars worth of goods from him; that has been 15 or 18 years ago. I dealt with him for years and years, and I think at that time I loaned him $3,000 or $4,000 and T. A. Snow $3,000 or $4,000 also, and just took their notes for it. I was talking to my wife about it not long ago, and she said he was one of the men.

Q. I did not intend to go back so far as that, but intended my question to apply to the last 5 or 6 years.

A. No, sir; during the last five years in the business way Mr. Merriam has not been looked upon as a substantial merchant in good condition.

Q. That was not my question at all. I was asking as to his standing in the community, as to his reputation for integrity, reliability, etc.?

A. Mr. Merriam's reputation as a gentleman and a man around town was good. Mr. Merriam had a habit of telling or at least a way of telling those that had business dealings with him things which did not turn out so, which put him in a bad light with those who had claims against him. While I do not wish to say anything derogatory to his character as a gentleman, he would tell you things he would do and would not do; that he would adjust things, and then not keep his word, so I thought bad of him myself. But I could not give Mr. Merriam a bad name. He was thought well of by people in
46 general. And I think now that often these prevarications you might call them that he made to me was caused by his being so hard up he could not keep his word.

And further this deponent saith not.

Sworn to before me this 18th day of December, 1903.

BRUCE FORSHEE,
Notary Public.

[SEAL.]

Deposition of Robert Pritchard.

ROBERT PRITCHARD, the next witness called, being duly sworn, deposed as follows:

(Examined by Mr. LANCASTER:)

Q. You are a member of the firm of Pritchard & Sizer, attorneys of this bar, are you not?

A. Yes, sir.

Q. How long have you known I. B. Merriam, the bankrupt in this cause?

A. I do not remember just how long; some fifteen or sixteen years, probably.

Q. Are you acquainted with Mr. Thomas Merriam, the defendant, and if so, how long have you known him?

A. I have known him slightly for probably a year and a half or two years.

Q. Are you acquainted with Mr. Robertson, his partner, who has testified?

A. Yes, sir, I have known him in the same way and for about the same length of time.

Q. Have you or your firm ever represented the firm of Merriam & Son as attorneys?

A. Not that I now recall.

Q. Did you ever represent the firm of Merriam & Storey?

A. I do not think we did.

Q. Have you had any business with Mr. I. B. Merriam in connection with Mr. Jarnagin? If so, in what capacity did you attend to it?

A. Prior to Mr. Merriam's bankruptcy, the only business I recall ever having with Mr. Merriam in connection with Jarnagin was business growing out of and connected with the lands known as the Cumberland County Coal Lands which Merriam and Jarnagin owned as tenants in common.

47 Q. Please state fully how you became connected with these gentlemen in reference to these coal lands; what was your connection with the coal lands from the beginning to the time they were sold by Merriam & Jarnagin to Thomas Merriam, the defendant in this cause; for what purpose you were employed; what investigation, if any, you made as to the title of the property; what is your knowledge concerning efforts made to sell the lands in question at various times; what occurred in reference to the sale of these lands by Merriam and Jarnagin and Thomas Merriam, and if you have any copies of contracts for the transaction in question, if any such contracts were made, please file them as exhibits to your deposition. I ask this general question to the end that you make a general statement from the beginning to the end of your connection with the land?

A. My knowledge in connection with these lands extends over a period of something like twenty years. I knew the lands before I knew Mr. Merriam. My first connection with these lands, known as

the Burk and Haley lands was when I lived in Madisonville and practiced law in sundry counties, including Cumberland. I was employed in connection with Mr. F. D. Owings in some litigation in which the title of these lands was somewhat involved; and subsequent to that litigation, I, in connection with Mr. Owings, acquired an interest in the lands, and I subsequently sold my interest and that of Mr. Owings to Merriam and Jarnagin. That was probably in 1889 or 1890, and that was their first connection with these lands. It may be that we did not sell directly to them, but my recollection is that the sale was worked up by Sam Dodson and probably Mr. Thomasson, who were doing some sort of a real estate business at the time—during the boom period. But, at any rate, Merriam and Jarnagin acquired the interest in the land that Owings and I owned and subsequently acquired other interests in the lands. It became necessary for them to have the title to the lands cleared, and particularly against a claim known as the Center claim, involving considerable bodies of lands under certain grants known as the McEwen Grants. Merriam and Jarnagin employed our firm (that was after I came to Chattanooga) to file a bill in the Chancery Court at Crossville to clear up the title to these lands, and we did so.

Later there were bodies of lands that overlapped these lands
48 to a considerable extent and we cleared up the title in regard to these lands. I mention these matters for the purpose of showing that from that period up to the present time our firm has been in touch with these lands and engaged in transactions connected with them. If during that entire period Messrs. Merriam and Jarnagan ever had any one else to represent them, I never knew of it or heard of it until it developed in this case that Mr. Merriam had had a Mr. Dorton of Crossville to draw to Thomas Merriam a deed of trust, as will hereinafter appear. Throughout all that period of time I had had numerous, I might say almost innumerable conferences with Mr. Merriam and Mr. Jarnagin concerning these lands. The question of title has arisen a good many times, resulting in litigation in the State and Federal Courts, and I believed, until this deed of trust was mentioned, that I was entirely familiar with the title to these lands, and did not believe, until this deed of trust was mentioned, that any feature concerning the title had been concealed from me by Merriam or any one else.

For the last few years, Mr. I. B. Merriam has to my knowledge been in very straightened financial circumstances. We have had numerous debts to collect against him. We were not his attorneys and represented him in no matter whatever except matters connected with these Cumberland County coal lands. I may state that universally, with the exception of matters connected with these lands, our relations with Mr. Merriam were antagonistic; and it was, therefore, necessary for us to keep as well acquainted as possible with his financial condition, and his ability to pay debts. He was very hard run and hard pressed, and consequently deceived us in statements as to when he would pay debts. He resorted to antedating checks, and would frequently say he had paid a debt when a claim was presented to him, and after the presentation of the claim

would mail checks to creditors, so as to get time that would elapse in the transmission by mail of the check to the creditor, and when the thing was run down, we would ascertain that the debt had not been paid at the time he represented and that he had mailed the checks after the claim had been presented to him. This sort of thing and others of the same character occurred constantly and with the claims we had against him we had a great deal of trouble.

During this period Mr. Merriam was very anxious to sell his Cumberland County coal lands, and several sales were discussed and
49 negotiated, he was always, constantly saying that if he could make the sale of these coal lands, he would be able to pay his debts in full, and we believed it was an asset upon which we could rely; and, relying upon that asset, we felt reasonably safe for our clients, his creditors.

I do not recall when Thomas Merriam and Mr. Robertson first began to negotiate for the purchase of the coal lands. These negotiations originated with Mr. I. B. Merriam, and resulted in Robertson and Thomas Merriam coming to Chattanooga, and they were at our office several times. About the 15th of November, 1902, they were here and a trade was made with I. B. Merriam and G. H. Jarnagin for the purchase of these lands for $150,000 in cash. Mr. Thomas Merriam did not mention, insinuate or intimate in any fashion whatever that he had any deed of trust or claim of any sort against I. B. Merriam, nor intimate in any way that the purchase was to be for anything but money. The contract for the sale of the land was put in writing. I did not personally draw that contract; but, according to my recollection, I was out of town a part of that day, and when I got to the office I found Robertson and Thomas Merriam there, or they came in soon after I got to the office, and the contract had already been prepared by Mr. Sizer, my partner. It was submitted to me and executed by those gentlemen then. I have not made any very careful search for a copy of that contract, but the search I have made did not disclose it. The contract was made with Merriam and Jarnagin on the one part, and Thomas Merriam and Mr. Robertson on the other. I do not find a copy of it. The original is in the possession of some of the parties. It provided, as I remember it, for the payment of $150,000 in cash for the lands by a certain time, my recollection being that the time in which the payment was to be made was on or before the 15th day of April following, though Mr. Sizer may recollect that date better than I. At about the time this contract was drawn a deed of conveyance was prepared, and at the request of Thomas Merriam and Robertson, concurred in by I. B. Merriam and Jarnagin, the name of the vendee in the conveyance was left blank. That deed was upon the same terms as the contract, and I have before me a copy of that deed in the letter press book. The recital is in these words: "For and in consideration of the sum of one hundred and Fifty thousand dollars, cash in hand paid, the receipt whereof is hereby acknowledged, we, G. H. Jarnagin and wife, Jennie R.
50 Jarnagin, and I. B. Merriam and wife Sarah E. Merriam, all of the County of Hamilton and State of Tennessee, have

bargained and sold and do hereby transfer and convey unto —— —— the following described real estate, lying in the County of Cumberland and State of Tennessee, consisting of two tracts of land, to-wit:" Then follow the descriptions, the ordinary covenants of warranty, the release of homestead, dower, etc. I refer to that deed as showing the consideration, which as stated above is the same as that expressed in the contract, according to my recollection of the latter.

At or about the same time we were requested to furnish to the purchasers, whom at that time appeared to be Merriam and Robertson, (we supposing and believing they were buying as joint purchasers, and they stating that they were buying with a view of operating the coal mines on the property) an abstract of the title to these lands, a letter press copy of which is before me. The last clause in this paper is as follows:

"Messrs. Merriam and Jarnagin inform us the *the* only encumberance of lien against this land now outstanding is the indebtedness of $4,000 in favor of the Chattanooga Savings Bank secured by a deed of trust on these lands."

It was necessary to inquire of these gentlemen in person about this matter, for the reason that this abstract was prepared from an old one that we had previously prepared, and we did not know, except as these gentlemen informed us, whether any subsequent incumberance had been placed upon the land. Consequently, we inquired of these gentlemen specifically, and they made the statement to us which I have read from the abstract. The deed and contract for the cash payment of $150,000 were not objected to by either Mr. Robertson or Mr. Thomas Merriam, and neither of them corrected or offered to correct the statement that the land was unencumbered except to the extent of $4,000. If they or either of them knew at the time that the land had a mortgage of $35,000 or an unregistered deed of trust for $35,000, they knew they were practicing a fraud on us, and it was their duty to speak.

This trade with Merriam and Robertson hung a good long time. Mr. Thomas Merriam was here once or twice after that in conference with his brother, I. B. Merriam and Mr. Jarnagin; and he and Mr. Robertson visited the land one or more times, or left here with that purpose, and declared intention, and in the interval before the trade was closed we had some correspondence with Thomas
51 Merriam in regard to these matters. Mr. Thomas Merriam and his partner or agent, Mr. Robertson, wanted I. B. Merriam and Mr. Jarnagin to acquire titles from T. A. Wright to certain lands lying within the outside boundaries of the Burke & Haley lands, and they did so. Mr. T. A. Wright furnished abstracts and these abstracts were submitted to us by Merriam and Robertson through Mr. I. B. Merriam and Mr. Jarnagin, for our examination and attention, and we wrote a letter to I. B. Merriam to be transmitted with the abstracts to Thomas Merriam on March 11th, 1903, a copy of which I can furnish. This letter was addressed to I. B. Merriam at his request so that they could send the letter on with the abstracts. The last clause of our letter was as follows:

"We address this letter to you and return to you the abstracts of title furnished us by Mr. Wright so that they may be submitted together to the proper parties, whose address we do not know."

Mr. Robertson was at the time, I believe in some place in New York other than Syracuse. I do not now recall his address.

Shortly after this time a surveyor was employed by Merriam and Robertson by the name of James H. Moses, to make some surveys of these lands, and this man, Moses wrote some discouraging letters concerning the lands to Thomas Merriam or Robertson, or both of them, which letters were submitted to us or to me, and on April 11, 1903, I wrote Thomas Merriam personally concerning these statements of Moses, and the questions Moses made as to the acreage, etc. On April 13th, I find that I again wrote to Thomas Merriam concerning these lands. In these letters there is nothing that especially bears on the matters here involved, but mainly discuss the question of title and the statements that Moses had made concerning persons connected with the transaction.

After some delay and after the last visit which Thomas Merriam and Mr. Robertson made to this section before closing the trade, they began to claim that they could not, or would not, close the trade unless there was a reduction in the price of the lands, and Mr. Jarnagin became anxious to close the deal on account of Mr. I. B. Merriam's financial condition and the fear which he expressed that Merriam might make an assignment or fail in business and his interest in the land would be tied up pending
the winding up of Mr. Merriam's affairs; and Merriam was
52 anxious to sell because he said he would realize enough
money from the sale to pay up his debts. Various negotiations resulted, finally culminating in a communication, which I think was by wire, from Merriam or Robertson, probably to Merriam alone, offering to take the lands for $100,000 cash and certain stocks. I was consulted about this offer and I was of the opinion that the contract which had been signed in November, was a sale and not an option; that there was no condition in it except the payment of the money, which should precede the delivery of the conveyance, and it was a straight purchase of the property by Merriam and Robertson, and so advised, being of the opinion then that if they did not take the property for $150,000 they should be sued for the consideration and made to pay it, because I believed then, and still believe, that Mr. I. B. Merriam and Mr. Jarnagin had complied with all the conditions of the trade on their part. However, the circumstances above referred to induced willingness on the part of our client to sell at the reduced price, and I then advised if they were willing to sell, the unconditional acceptance of the offer. This resulted in a telegram being sent, substantially to the effect that Jarnagin accepted the offer as made in the communication from Merriam and Robertson, but that I. B. Merriam accepted the offer as made to him by his brother at Rockwood. What the offer at Rockwood was, I did not know; I inquired about this of Mr. Jarnagin and possibly both of Merriam and Jarnagin, but I was not informed. That was the very first time I had any idea the trade was

not alike to I. B. Merriam and G. H. Jarnagin, and the first time I had any suspicion that anything connected with the sale of the lands was concealed or suppressed. The papers were prepared at once and a new deed was drawn by me, conveying as I remember, the property to Thomas Merriam individually and at the request contained in a letter from Thomas Merriam or his partner Robertson, or both of them, the consideration was stated to be $250.00 or $500.00 and other good and valuable consideration.

I preferred to put in the deed the consideration, namely, $100,000 in cash and the stock; but the ground upon which Thomas Merriam and Robertson put the request was the heaviness of taxation on the conveyance. I did not then suspect that any other reason actuated their changing the language of the deed. I protested against it when drawing the deed, and stated to I. B. Merriam and Mr.
53 Jarnagin that I believed I would draw the deed and set out the true consideration anyway, but in deference to the wishes of the purchasers, I did draw the deed stating the consideration to be, according to my recollection, $250, and other good and valuable consideration. In other respects the conveyance was, according to my recollection, a transcript of the original deed executed in blank at the time of the original contract for sale. These deeds described the land by outside boundaries; but in a letter containing instructions for the deed, Messrs. Merriam and Robertson, or the writer of the letter acting for both, insisted that the deed should not only describe the lands by metes and bounds, but should also describe the tracts of land acquired from Wright which lay inside the outside boundaries. Of course, this was absurd, but in compliance with that request, I added to this deed a clause of clauses stating that the boundaries as given in the deed did include the "following lands" describing them namely, the lands acquired from Wright. When these papers were drawn it was my idea to transmit them to some bank in New York—in Syracuse—to be delivered to the purchaser when the purchase money should have been paid. But on the day the papers were completed, I was informed by Mr. I. B. Merriam that he wanted to go to Syracuse in person. I was somewhat surprised at this and really did not think it proper that he should go, and Mr. Jarnagin expressed his disapproval of Mr. Merriam's going, and insisted that if any one went, I should go. I did not think it necessary for any one to go, and so stated. When Mr. Merriam was asked why he deemed it necessary that he or anybody should go up there, he stated that his mother was old and sick and he wanted to avail himself of this opportunity to visit her, and he did go to New York, taking with him the deed of conveyance. But before leaving, the telegram accepting the reduced offer for the lands had so aroused Mr. Jarnagin's suspicions and, I may add, my own as well, that I suggested to Mr. Jarnagin the propriety of limiting Mr. Merriam's authority in representing him while in Syracuse. So, I drew a power of attorney from G. H. Jarnagin to I. B. Merriam limiting his power to the delivery of the deed to Thomas Merriam, and stating that he should only have the right to deliver it—so far as Jarnagin was concerned, upon Jarnagin's proportion of the purchase money,

namely $50,000 in cash, being transmitted to Jarnagin by New York Exchange prior to the delivery and taking effect of the
54 deed. I had that paper executed by Mr. Jarnagin and it was delivered to Mr. Merriam and constituted Merriam's authority to act in the premises for Mr. Jarnagin. Mr. Merriam represented that he intended to collect the money and represented repeatedly, as already stated, that with that money he would discharge sundry debts, including several claims we had for collection against him.

We had received from Messrs. Merriam and Jarnagin no compensation for our services in connection with the sale of these lands to Thomas Merriam and Robertson, and they owed us a fee at the time of the sale of $1,000 and it was understood that I. B. Merriam was to pay $500 and Jarnagin $500 of the fee. When Mr. Merriam returned, Mr. Jarnagin paid us $500 but we hardly saw I. B. Merriam at all. He paid us nothing. Mr. Jarnagin expressed a willingness to pay the whole fee, but we declined to allow him to pay more than half of it. Merriam did not return with the money and pay us the $500 he owed us, and he has not yet paid it and it was proven as a claim in this bankruptcy proceeding.

Q. State whether or not, previous to going to New York, Mr. I. B. Merriam had represented to you that immediately upon his return he would pay this debt of $500 your firm had against him?

A. I do not know that he made just that representation, but that was the idea of the whole thing; that he was to get the money and then make payment, and whether immediately upon his return or not was not very material.

Q. How long after Mr. Merriam's return from New York was it that he filed his petition in bankruptcy?

A. Several days; probably a week. I do not remember exactly.

Q. Did you see Mr. Merriam between those dates—his return and the filing of the petition?

A. I am almost positive I did not.

Q. When did you first learn that there was claimed to be outstanding a trust deed or mortgage to Thomas Merriam from I. B. Merriam covering the Cumberland County Coal lands?

A. Not until after the bankruptcy proceeding and when I believe I. B. Merriam gave his testimony.

Q. State whether or not Mr. I. B. Merriam and Mr. Thomas Merriam were in your office in the early summer of 1903 pending the closing of this trade?

55 A. They were, but I could not undertake to be positive about the different times they were here. My recollection is that they were here some time after the 11th of April, because I see that is the date of the letter written to Thomas Merriam. It was between the 11th of April and the time the sale was closed; but I can not state just when.

Q. Did you then have any discussion about this deal?

A. I think not. I think not, except in a general discussion as to the value of the lands, and some discussion about the description of the lands, which was a very immaterial matter.

Q. They were in your office at that time, and talked about the property while there, and made no mention of the trust deed?

A. They were in my office and they made no mention of it. As stated above, I never heard of it, though in numerous conversations with these gentlemen it was material for them to mention it.

Cross-examination.

(By Mr. CHAMBLISS:)

Q. Mr. Pritchard, you stated that sometime prior to the making of this sale, Mr. Jarnagin expressed a desire to consum-ate the sale, and gave as a reason the apprehension that Mr. Merriam might fail or make an assignment. Do you remember when this was and where it was and who were present?

A. That was in this office at the time of the asking for the reduction in the price of the land. I thought the sale had already been made to Thomas Merriam and Robertson and still think so, as a legal proposition, and consequently suggested that they could be held for the $150,000 and that they could be made to take the property at that price, but that it might require litigation to do so. Mr. Jarnagin expressed the apprehension I have already referred to, and said that he preferred to sell for a less sum in order to get the matter closed.

Q. There was no one aside from yourself present at that conversation, then?

A. I think not.

And further this deponent saith not.

ROBERT PRITCHARD.

Sworn to before me this 19th day of December, 1903.

BRUCE FORSHEE,

[SEAL.] *Notary Public.*

56 *Deposition of Ernest Scholze.*

ERNEST SCHOLZE, the next witness called, being duly sworn, deposed as follows:

(Examined by Mr. J. HODGE MCLEAN:)

Q. State your name, age and place of residence?

A. Ernest W. Scholze; I live in Chattanooga.

Q. How long have you lived in Chattanooga, Tenn., and what is your business?

A. I have lived in Chattanooga, Tenn., 33 years. I am in the soap business and leather business.

Q. State whether or not you are acquainted with I. B. Merriam?

A. Yes, sir; I am, to my sorrow.

Q. Did you not have any deal-ngs with the firm of Merriam & Son?

A. I did, a good deal of them.

Q. Are you, or not, one of the creditors of I. B. Merriam?

A. I am, to the extent of $449.70.

Q. How came Mr. Merriam to owe you this indebtedness?

A. Well, he bought soap from me and kept on hanging back and wouldn't pay me. He gave to me the notes and let them go to protest; he wouldn't pay them anyhow. And then he promised me as soon as he sells his coal land up in Cumberland, and he said he was going to sell quick, he would pay me without any fail. He kept on promising and put me off with *with* that coal deal every time I asked him for money. He would say when I met him on the street: "Well, I haven't completed that deal yet, but I will in a very short time." And every time I would meet him on the street he would say: "It is going through now and you will soon have your money." He always said that, and at last it did go through and I didn't get my money either.

Q. Was your claim an old one or was it a recent indebtedness?

A. I quit selling him in October, 1901. His stock and everything had run down so bad and I couldn't get any money out of him and I thought it was dangerous to sell him any more. Whenever he wanted ten boxes of soap, he had to send a check for it with
57 the order or he didn't get the soap. That coal deal got to be an old chicken with me and I wouldn't credit him any more.

Q. Did you or not visit the place of business of Merriam & Son, say during the last six months prior to the time he took the bankrupt act?

A. Yes, I was there about once a week trying to get some money out of him, and every time I came there I got scared. His stock was so small and it kept getting less and less until it looked only like a retail grocery store.

Q. What kind of a business did I. B. Merriam claim to be engaged in?

A. The wholesale grocery business.

Q. What kind of a stock did Mr. Merriam keep for the last few months prior to his bankruptcy—a large or a small stock?

A. About as much as a retail grocery ought to keep.

Q. A great big retail grocery or a small one?

A. It was a small stock.

Q. State what his credit was during the last six months prior to his bankruptcy?

A. It was not much account because he did not pay anything.

Cross-examination.

(By Mr. CHAMBLISS:)

Q. Mr. Scholze, when did you last make your examination of the stock of goods you speak of? When did you last go through it and examine it?

A. I didn't examine it at all. I just cast my eyes over it and see he did not have much. I never examined at all. They had such a great big building and such little stock you could hardly see it.

Q. He had a great pile of boxes and cases piled up there didn't he?

A. No, sir; he had no big pile of anything I could see.

And further this deponent saith not.

Sworn to before me this 19th day of December, 1903.

BRUCE FORSHEE,
[SEAL.] *Notary Public.*

Endorsed: Filed April 15, 1904.

58 *Deposition of I. B. Merriam. Filed December* 2, 1903.

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

In re I. B. MERRIAM, Bankrupt.

H. F. ROGERS, Trustee, Petitioner,
vs.
THOMAS MERRIAM ET AL.

Deposition of I. B. Merriam, the bankrupt, taken on behalf of H. F. Rogers, Trustee, petitioner, on this the 19th day of August, 1903, at the office of Pritchard and Sizer, Temple Court, Chattanooga, Tenn., in the presence of Mr. Frank Spurlock, Mr. A. W. Chambliss, attorneys for defendant, and Robert Pritchard and Geo. D. Lancaster, attorneys for petitioner.

The said witness, I. B. MERRIAM, being first duly sworn, deposes as follows:

Direct examination.

By Mr. LANCASTER:

Q. Where do you live?
A. Chattanooga—234 Vine street.
Q. How long have you lived there?
A. 23 years last September.
Q. Are you the bankrupt in this cause?
A. Yes, sir.
Q. When did you file your petition in bankruptcy in this cause?
A. 9th day of June, 1903.
Q. State, Mr. Merriam, what was the amount of the assets conveyed by you in that petition in bankruptcy for the benefit of your creditors?
A. $79,000.00 I think it was.
Q. $79,000.00 of what?
A. Merchandise and real estate.
Q. Was that estimate of $79,000.00 your estimate of the value of the property or the appraisers' estimate?
A. The estimate which I gave you?
59 Q. The estimate you gave in?
A. It was my estimate.
Q. State whether or not the assets conveyed consisted of certain real estate in Chattanooga, certain stock of goods on hand at your

store, and certain choses in action in the way of bills and accounts receivable?

A. Certain bills and accounts, real estate and stock of goods.

Q. All of the assets thus conveyed are set forth in your schedule attached to the petition in bankruptcy?

A. They are.

Q. In what business were you engaged?

A. Wholesale grocery.

Q. How long had you been engaged in that business?

A. 23 years last September.

Q. In the city of Chattanooga?

A. In the city of Chattanooga.

Q. What was the extent of your liabilities?

A. About $80,000.00.

Q. A little over $80,000.00?

A. Yes, sir.

Q. Now state what part of these liabilities were secured by the mortgage or trust deed or vendor's lien on the real estate you conveyed?

A. About two-thirds.

Q. State whether or not, as a matter of fact, the total amount of liabilities thus secured did not amount to about $38,000.00?

A. I don't know what amount they were valued at.

Q. Your schedule will show the exact amount?

A. Yes, sir.

Q. State whether or not all your real estate conveyed was encumbered in this manner?

A. All the real estate was encumbered.

Q. And all the real estate conveyed was encumbered by prior liens?

A. Yes, sir.

Q. State whether or not the only property not so encumbered which you conveyed for the benefit of your creditors consisted of the little stock of goods you had on hand at your store, and accounts and bills receivable?

A. Yes, sir.

Q. Were not appraisers appointed by the bankruptcy court to appraise the value of your real estate and personal property?

60 A. Yes, sir.

Q. What did these appraisers report as to the value of all your real estate?

A. I never saw the statement they made.

Q. I hand you herewith what purports to be the report in question made by the appraisers, I ask you to examine it and state whether or not this report does not show the total value of all your real estate to be $43,350?

A. I think this shows a statement of all my property.

Q. Was not the most valuable part of the real estate thus conveyed your lot on Chestnut street in this city, on which was your store room?

A. That was the highest-priced piece of property.

Q. The most valuable?
A. Yes, sir.
Q. How was that property encumbered?
A. By a mortgage held by the Penn Mutual Insurance Company.
Q. For how much?
A. $13,500.00.
Q. Was there any other mortgage on the property?
A. A mortgage held by the First National Bank for $4,500.
Q. That property the appraisers have valued at $20,000.00?
A. $20,000.00.
Q. The mortgage of the Penn Mutual also covered a lot on the North end of Market street, did it not, which was appraised at $1,000.00?
A. Yes, sir.
Q. Do you know what disposition has been made of these two lots by the trustee or the creditors in bankruptcy since your petition was filed?
A. The First National Bank bought the Chestnut Street property—I don't know who bought the other.
Q. Don't you know as a matter of fact that the Penn Mutual and the First National Bank took those two lots in full satisfaction and discharge of their secured liabilities without paying any excess into the fund for the benefit of creditors?
A. So I understand.
Q. Examine this report of the appraisers, and state which of the property therein described was encumbered by a deed of trust or mortgaged to secure the indebtedness to Mrs. Vann?
61 A. 27 lots in Curtis' Addition, which were appraised at $4,275.00; three of the six lots in the Wilhoit Addition, these last six lots being appraised at $3,650.00.
Q. What was the amount of indebtedness due Mrs. Vann which was secured by this trust deed?
A. A little over $6,000.00.
Q. Do you know what disposition has been made of this particular property by Mrs. Vann since the filing of the petition in this cause?
A. I do not.
Q. Don't you know, as a matter of fact, that it has been sold under foreclosure, and the sale realized less than the amount of the debt secured by $3,500.00?
A. I did not know it.
Q. To what extent was your home place on Vine street encumbered?
A. $5,000.00.
Q. To whom was that debt owing?
A. Chattanooga Savings Bank.
Q. What has become of the property since the filing of the petition in this cause?
A. Mr. Jarnagin has bought the note.
Q. State whether or not Mr. Jarnagin and your creditors have

agreed that Mr. Jarnagin should take this property in full satisfaction of the debt which he holds against it?

A. I think they had an agreement—I was not present at the time.

Q. Do you know what disposition has been made of the remainder of the real estate conveyed under this petition?

A. Mr. Cate had a deed of trust on the three lots on Montgomery Avenue; Wilhoit Addition has not been disposed of yet. He had a deed of trust on some lots called Peyer Addition.

Q. I ask you to examine again the report of the appraisers what was the appraised value upon the stock of goods at your wholesale store, including the fixtures in the store?

A. The stock was appraised at $1,183.41, and the fixtures at $103.05.

Q. State whether or not the trustee has since sold the fixtures?

A. He has.

Q. At private or public sale?

62 A. Private sale.

Q. What did he realize from that sale for your stock of goods and fixtures?

A. I don't know.

Q. I will ask you to examine his report, and state whether or not he does not report the sum of $1,000.00 as the amount realized?

A. Yes, sir.

Q. Please state what was the estimated value or the appraised value of the accounts and bills receivable which you turned over to the trustee in this cause?

A. I don't know.

Q. Please state whether or not the trustee has reported that the value of the property will not exceed fifteen or eighteen hundred dollars?

A. I don't know that, Mr. Lancaster, I have not seen him in the last few days.

Q. Please state whether or not the trustee has not reported that the total amount that can be collected from all assets conveyed by you under this petition for the benefit of unsecured creditors will not realize a sum in excess of $1,800.00?

A. I was not present when the report was made—I don't know what it was.

Q. So that, Mr. Merriam, the total amount of assets realized by creditors under this petition will be $1,800.00, which after paying expenses, the remainder will be the only fund that will be distributed on over $40,000 or $50,000 due unsecured creditors?

A. That will be the amount realized.

Q. In scheduling your assets, did you describe all of the property that you had of every kind and description except that exempted by law?

A. I did.

Q. State whether or not a few days prior to the filing of the pe-

tition in this cause you had other property than that conveyed under this petition, and whether or not you sold or disposed of the same?

A. I had a piece of coal property in Cumberland County, Tenn., of 10,000 acres.

Q. To whom did you sell that property and when?

A. I sold it to Thomas Merriam. The transaction was closed the first day of June.

Q. The first day of June, 1903?

A. Yes, sir.

63 Q. Who was interested with you in the ownership?

A. Mr. Jarnagin.

Q. What interest did he have?

A. A one-half interest.

Q. How long had you and he owned this property together?

A. Between twelve and thirteen years last fall.

Q. How much did your brother pay you for this property—what was the purchase price?

A. $65,000.00.

Q. Cash?

A. Yes, sir.

Q. What else?

A. $65,000.00 and $20,000.00 in stock of the company they were to organize.

Q. $20,000.00 in stock of the company to be organized—what company was that?

A. The Tennessee Iron, Coal & Lumber Co.

Q. Was this property conveyed to that company by Thomas Merriam?

A. Yes, sir.

Q. Immediately after you sold it to him?

A. Yes, sir.

Q. And a part of the purchase price was that you should get $20,000.00 of the fully paid-up capital stock of that company, organized to own and operate the property in question?

A. Yes, sir.

Q. Has that stock been issued to you?

A. It was issued to me while at Syracuse.

Q. Was the $65,000.00 paid you while in Syracuse?

A. $65,000.00 was not paid me. The amount was taken out that I owed parties there in Syracuse—my brother and the Merchants National Bank.

Q. How much did your brother take out for moneys that you owed him?

A. Part was taken out there and part here.

Q. I mean the amount you owed him individually, directly?

A. I made a report showing the amount. I don't recollect just what it was. The report on file will show.

Q. Will that report also show the amount you paid the bank at Syracuse, N. Y., before coming here?

A. Yes, sir.

Q. I hand you herewith what purports to be a copy of the
64 report made by you during your previous examination before the referee in this cause, setting forth the moneys you actually paid Thomas Merriam at that time out of this purchase price, and the sums you actually paid the Merchants National Bank of Syracuse, N. Y., out of this purchase price. Examine this copy, compare it with the original, and state whether or not it is correct. If so, file it as "Exhibit A" to this, your deposition?

A. I think this is a correct copy, and I herewith file it as "Exhibit A" to this, my deposition.

Q. This report or statement shows, Mr. Merriam, that out of this fund you paid your brother at that time the sum of $18,555.03, principal, and the sum of $5,341.04, interest, is that correct?

A. Yes, sir; I think it is correct.

Q. The report shows the dates upon which the notes in question were made payable to your brother—the principal of these notes has a separate column showing the interest you paid on each note—are these statements correct?

A. Yes, sir.

Q. Then do you mean to say that the notes you paid your brother were the original notes made on the dates set forth in this statement, or renewals of old notes?

A. Yes, sir.

Q. Now, Mr. Merriam, how do you account for the fact that the interest you paid on these notes was so large?

A. Part of that interest was for drafts I drew from time to time. Whenever the original notes were renewed, the interest I had paid on other drafts was added with the interest on these notes.

Q. State whether or not from the time these notes were originally made to the time of their actual payment, as shown opposite, you ever paid your brother, Thomas Merriam, one cent of interest on the notes?

A. I did not.

Q. State whether or not in computing the interest set forth in this statement he charged you straight interest at six per cent., or whether he compounded all interest every year?

A. The interest was compounded every year from the time the notes were given until the end of the year and then the interest was added to the notes.

Q. I notice in the list a note bearing date March 1, 1897, for $10,000. The interest on that note is stated to be $4,397.70. Was that compounded?

65 A. Yes, sir.

Q. I find another note for $750, bearing date March 5th, 1898, interest $268.75. Was that compounded?

A. Yes, sir.

Q. And in the same manner, all of the notes had the interest on them, during the time they ran, compounded?

A. Yes, sir.

Q. This list, in the same manner, sets forth certain obligations to the Merchants National Bank of Syracuse, N. Y., and the dates on

which they were taken up is shown opposite the principal and interest paid at that time. State whether or not the dates contained in that statement are the correct dates when those notes were originally made, or are those the dates of the last renewals of those notes?

A. They are the dates of the last renewals of the notes.

Q. When were those notes to the Merchants National Bank originally made?

A. There is a report which I gave the court showing—I don't recollect now.

Q. About how far back did they go?

A. I think as far back as '97 or '98—the statement shows.

Q. Now, Mr. Merriam, how often were those notes renewed in bank?

A. About once in ninety days.

Q. Sixty or ninety days?

A. Yes, sir.

Q. Did you, at any time, pay any interest to the bank?

A. Not to the Syracuse bank.

Q. Was the discount or interest included in the face of the new note?

A. Yes, sir.

Q. So the amount these notes represent is the original principal and the discount added and compounded every sixty or ninety days from the time said notes were originally made until their payment in June last?

A. Yes, sir.

Q. Who was the endorser or surety on these notes to the Merchants National Bank?

A. My brother, Thomas Merriam.

Q. Had he been endorser on these notes from the beginning?

A. Yes, sir.

Q. To whom did the Syracuse National Bank extend this credit to you, or on account of your brother's liability?

66 A. On account of his liability.

Q. You had no property in New York?

A. I had none.

Q. You were unknown in a business way at that bank?

A. Yes, sir.

Q. And the security in question was extended entirely on account of your brother's liability?

A. Yes, sir.

Q. How much is your brother worth?

A. Well, he is estimated to be worth from $250,000 to $300,000.

Q. Is that exclusive of his interest in the Merriam Manufacturing Company?

A. I don't know, Mr. Lancaster. I have heard him estimated at $500,000, $250,000 and $300,000. The latter is the estimate which I have always supposed to be about correct.

Q. In other words, he is a man of independent means?

A. Yes, sir.

Q. How did you pay these various obligations to your brother and

the Merchants National Bank? Were the funds turned over to you, and did you in turn give your check or pay the cash to your brother Thomas Merriam and the Merchants National Bank, or how was it?

A. The sale was made of the land and those amounts deducted from the purchase price which I was to have.

Q. Who deducted these sums?

A. My brother and myself were together.

Q. As a matter of fact, he figured out the debts and deducted them from the purchase price and retained from the purchase price the amount of these debts that you owed him and the amount that you owed the Merchants National Bank upon which he was endorser?

A. Yes, sir, he made a statement to me and this amount was taken out.

Q. As a matter of fact, the money was not paid to you?

A. Not directly to me.

Q. Who paid the Merchants National Bank?

A. Thomas Merriam.

Q. Now the total shown by this statement of the purchase price thus used was $43,374.06?

A. Yes, sir.

Q. What became of the balance of that purchase price?

A. He paid me the balance.

Q. What did you do with this money your brother paid you?

67 A. Part of that money was paid to the different banks here in Chattanooga on other notes which that report shows, and you have the notes on file which I paid.

Q. State whether or not, Mr. Merriam, you did not use practically all of the balance of this cash purchase price in taking up other notes in Chattanooga, Tennessee, upon which your brother was endorser or security?

A. About one-half, or less than one-half was used in taking up notes that he was endorser for. The report I made to the court will show where all the money has gone. Part of it—something over $12,000 was paid out on insurance I hold here.

Q. Then all except $12,000 or $15,000 was paid out on notes on which your brother was security?

A. Yes, sir.

Q. I hand you herewith what purports to be a copy of the statement which you filed before the referee in this cause, showing the disbursements of the proceeds of the sale of all your mountain land. Examine this copy, compare it with the original, and state whether it is correct—if so, file it as "Exhibit B" to your deposition?

A. Yes, this is a correct copy, and I herewith file it as "Exhibit B" to this, my deposition.

Q. State whether or not that is a correct statement of the manner in which you disbursed all of the proceeds coming from the sale of your mountain land?

A. Yes, sir.

Q. Mr. Merriam, when this property was sold there was a first mortgage on the property in favor of the Chattanooga Savings Bank,

made by yourself and Mr. Jarnagin, to the extent of $4,000.00, was there not?

A. Yes, sir.

Q. This had to be paid before clear title could be conveyed to your brother?

A. Yes, sir.

Q. Did you and Mr. Jarnagin pay this out of the purchase price?

A. I paid my part and he paid his part.

Q. I understand that Mr. Wright had some interest in the property—what was the extent of that interest, and how much of the purchase price did you have to pay him?

A. I paid him for the land which we bought of him, and in settlement of a cloud on the title.

Q. How much was your proportion of that claim?

A. $5,300.

68 Q. Was Mr. Jarnagin's the same?

A. Yes, sir.

Q. Now, then of this purchase price, $5300.00 went to Mr. Wright to pay him for his interest in the land and $2100.00 went to the Chattanooga Savings Bank to release the lien which that bank held, making a total paid out by you in that way of $7400.00?

A. Yes, sir.

Q. Isn't it a fact, Mr. Merriam, that practically all the remaining part of the purchase money turned over to you by your brother in New York was used by you in Chattanooga in taking up paper upon which your brother was security or endorser?

A. The amount shown in the statement that I made. There were a number of other payments made out of the money I brought back.

Q. Doesn't that statement show that practically the larger part of all that money was used in the manner I have just inquired about?

A. About $12,000, as I stated, was used for debts or notes on which my brother was not endorser.

Q. If $44,000 was used in paying debts in New York, and $8,000 was used down here in paying Mr. Wright and the Chattanooga Savings Bank, how can you figure that after paying $12,000 to other creditors there was anything left to go on account of notes owing down here by your brother?

A. The Wright matter was included in the twelve or fifteen thousand, as I stated.

Q. Then, if that is the case, you paid all of the notes, etc., endorsed by your brother except about $4,000, exclusive of the amount paid Wright and the Chattanooga Savings Bank?

A. The statement shows just what I paid.

Q. What did you do with the $20,000 of fully paid-up stock given you?

A. I endorsed that over to my brother.

Q. What was the consideration that moved you to endorse and deliver to him the $20,000 worth of stock?

A. My brother endorsed a note to the Merchants National Bank

for $3,333.00, I think those are the approximate figures, and also a note of $700-odd, one to Mr. Cate for $1,000, and then my brother gave me a note of $5,000 which I used at the First National Bank for one year, all amounting to $10,000.

69 Q. And to secure his endorsement on this $10,000 worth of paper, you transferred to him this $20,000 of stock as collateral security?

A. Yes, sir.

Q. What use did you make of the note for $3300.00 which he endorsed for you at the Merchants National Bank of Syracuse?

A. It was included in the money I brought back.

Q. Did you discount that note?

A. He discounted it and gave me the cash.

Q. Did you discount the $5,000 note?

A. Yes, after I returned.

Q. And got the money for it?

A. It went towards paying indebtedness at the First National Bank.

Q. Then the $5,000 which he endorsed for you, and to secure which you gave him this stock, you used at the First National Bank in taking up other paper of yours upon which he was an endorser?

A. Yes, the amount of paper taken up is shown on that report.

Q. Isn't it a fact that $5,000 was used in that way?

A. Yes, sir.

Q. What did you do with the proceeds coming from the discounting of that $3300 note at the Syracuse Bank?

A. It was included in the money I brought back here.

Q. And you used that to take up paper your brother was endorser on?

A. Yes, sir.

Q. This $700.00 you owed to Mr. Pope, wasn't your brother also endorser on that?

A. Yes, sir.

Q. And this new note of $700.00 to Mr. Pope is intended as a renewal, is it not?

A. Yes, sir.

Q. Wasn't your brother also an endorser on this $1,000 paper to Mr. Cate, and the new note was a renewal of that note?

A. Yes, sir.

Q. You say, as a matter of fact, Mr. Merriam, that your brother took possession of this $20,000 of stock to secure him on account of other endorsements made for you, and which, the purchase price was not sufficient to take up, isn't that so?

A. Yes, sir.

70 Q. So that, of that total purchase price of $65,000 in cash and $20,000 in stock of the company organized to own and operate the plant, with the exception of that amount necessary to pay the first lien of the Chattanooga Savings Bank, and the amount necessary to pay Mr. T. A. Wright for his interest in the property, practically every dollar, including the stock, has gone to pay your brother, or obligations your brother was endorser on for you?

A. Excepting, as I stated, $12,000 or $15,000.

Q. But that $12,000 or $15,000 included Wright and the Chattanooga Savings Bank?

A. Yes, sir.

Q. Then except three or four thousand dollars, every dollar has gone to the benefit of your brother directly or indirectly?

A. Yes, sir.

Q. Now, Mr. Merriam, of that three or four thousand dollars, examine your statement filed as "Exhibit B," and state whether or not practically all of it was used in taking up some notes upon which your friend, T. T. Wilson, was endorser, and your friend, Capt. Gahagan, was endorser, and the balance to your family or business?

A. The statement will show where the money has gone.

Q. Mr. Merriam, when your brother turned over to you in cash that part of the purchase price of the property which you brought with you from New York and used as has just been described, was it not with the express understanding and agreement that you should use that fund for the purpose of taking up his obligations at the banks down here?

A. It was, as far as his endorsements.

Q. Did he not say to you that unless you would upon your honor agree to do this he would not give you the money, but would give it to his partner, Mr. Robinson, to bring down here and use for that purpose?

A. He made a statement of that kind.

Q. And you did promise you would carry out his instructions?

A. Yes, sir.

Q. And he turned over to you that money, and you used the money as you have explained?

A. I have used it according to the statement.

Q. You say this sale took place the first of June, 1903?

A. Yes, sir.

Q. After the sale was closed, you came to your home in Chattanooga, did you not?

71 A. Yes, sir, I started that night.

Q. What day in June did you arrive here?

A. On the 3d of June, I think.

Q. You filed your petition in bankruptcy in this cause on the 9th day of June?

A. Yes, sir.

Q. Which was Monday, was it not?

A. Tuesday.

Q. Did you not go to your lawyer on Saturday previous and ask him to prepare a petition in bankruptcy?

A. I went to him first for advice.

Q. So you were at home only two or three days before you began to take steps to file your petition in this cause?

A. Yes, sir.

Q. Now, Mr. Merriam, of the real estate described in your schedule in this cause, how long have you owned this real estate?

A. I have owned it from ten to twelve years except my home. I

have owned that property about twenty years—some of it before; bought some of it during the boom.

Q. When was the boom?

A. I don't recollect the year now.

Q. Was it not about '87, '88 or '89?

A. Yes, sir.

Q. What do you mean by the boom of '87 in Chattanooga?

A. It was the time there was so much excitement here.

Q. And values became very much inflated, did they not?

A. Yes, sir.

Q. You bought your real estate, a large part of it, at that time, and later on?

A. I bought my home a number of years before, and I bought the real estate where the store is situated before.

Q. And the remainder of your real estate you bought at that time?

A. Yes, sir, some of it was bought later.

Q. Following the boom of 1889 came the panic of '93 and '94—what effect did that have upon real estate business in this community?

A. It depreciated in value.

Q. Have your real estate holdings increased or decreased since 1890?

A. Decreased. One or two pieces have been sold.

72 Q. So that the property described in your schedule is practically the same real estate you had in 1890, except a few pieces you have in the meantime sold to various parties?

A. Yes, except that I have sold about one piece in the meantime.

Q. As a matter of fact, wasn't the real estate you owned in Chattanooga more valuable on the first of June of this year than it has been at any time since 1890?

A. Yes, sir; I would say it was.

Q. For how long a period of time has this real estate been encumbered as described in your list of liabilities or by virtue of other encumbrances to pay off which later encumbrances were made?

A. I can not recollect when each piece was mortgaged.

Q. Were the mortgages that are now on the property made within recent years, or are they several years of age?

A. Part was made recently, and part several years ago—none for the last year or two.

Q. As a matter of fact, in 1890, wasn't your real estate encumbered for practically as much as it was at the time of the filing of your petition in this cause?

A. No, I think part was given since that time—the records will show.

Q. With the exception of the deed of trust you made some years ago to secure what was known at the Vann debt, practically all your property was encumbered as much by mortgage in 1890 as to-day?

A. I think the Cates deed of trust has been given since that time.

Q. Those are the only mortgages since that time that have been executed, is that correct?

A. The Cates deed of trust and the $4,500 to the First National Bank, and two deeds given to Mrs. Vann.

Q. As a matter of fact, these debts to the First National Bank, which you speak of, and to Mrs. Vann, were old debts at the time the mortgages in question were given to secure them?

A. Not to the First National Bank. It was given since then—given about the time the debt was made.

Q. You have not been engaged in any other business than the grocery business since 1890, have you?

A. No, sir.

Q. What has been the course of your business since that time—has it been profitable or unprofitable?

73 A. It has been unprofitable.

Q. How much did you owe in 1890?

A. Between eighty-five and one hundred thousand dollars.

Q. Now from 1890 down to date you have been engaged in a constantly losing business, and with a large interest debt to carry besides the expenses of your family, isn't that so?

A. Yes, sir; the interest debt amounted to a good deal each year.

Q. When did you form the partnership of Merriam & Storey?

A. I don't recollect the time just now. I recollect when the dissolution was made, that was in February, February 6th, I think, 1896.

Q. Who succeeded the firm of Merriam & Storey?

A. Merriam & Son.

Q. What was your son's name?

A. Frank Merriam.

Q. How long did that partnership last?

A. Until last May.

Q. What was the value of the stock of merchandise you had on hand at the time Merriam & Storey dissolved partnership?

A. I would have to go to the records to find out.

Q. Did you not state in your previous examination from ten to fifteen thousand dollars?

A. The examination will show. I don't recollect just what I stated.

Q. Whatever you stated was approximately correct?

A. I approximated it, and so stated.

Q. Did you buy out Mr. Storey, or did your son buy him out?

A. I bought him out.

Q. How much did you give him for his interest?

A. I gave him about $17,000.00.

Q. How much did you pay him in money?

A. I paid him in cash at the time $5,000.00, and then I made different payments afterwards.

Q. How much of the purchase price was represented by promissory notes, and how much is now overdue and unpaid on these promissory notes?

A. I gave him promissory notes for $12,000, and I paid him $5,000 cash.

Q. To what extent are those promissory notes unpaid?

A. $9,225 or $9,250 is unpaid.

74 Q. How old was Frank Merriam when he went into the firm of Merriam & Son?

A. About 22 years old.
Q. Did he put any new capital into the business?
A. He did not.
Q. What interest did he take in the firm?
A. He simply received a salary.
Q. So, as a matter of fact, the firm of I. B. Merriam & Son was really I. B. Merriam?
A. I guaranteed him so much salary, and he received that salary.
Q. Do you know what was the amount of indebtedness of the firm after Storey went out, exclusive of what you owed Storey?
A. No, sir; I don't recollect.
Q. Haven't you filed a statement in this cause, showing it to be between forty and fifty thousand dollars?
A. I hunted up such a statement from the books, and whatever it was I filed it. The total amount of my indebtedness was from eighty-five to one hundred thousand dollars. This included the firm indebtedness.
Q. Now Mr. Merriam, during 1896 and 1897, prior to that time and since that time, you have been a constant borrower of money, have you not?
A. Yes, sir.
Q. And in large quantities?
A. Yes, sir.
Q. And you have had great difficulty since 1896 especially in conducting your business and keeping your creditors from pressing you by litigation, have you not?
A. Yes, sir, until the last two years I have owed some debts which I was being pressed for.
Q. As a matter of fact, without the co-operation of your brother in lending you money and endorsing for you, you could not have kept out of the insolvency court since 1897, could you?
A. I don't know whether it has been as long as that.
Q. But for some time it has been so that without his active aid you would have been wound up under insolvent proceedings?
A. Yes, sir; I probably would have been.
Q. As a matter of fact, during the last six, seven or eight years he has been your financial backer?
A. He has endorsed paper for me, according to the statement there.
75 Q. Have you not frequently said to your creditors that your brother was your financial backer?
A. I have not been called on to make such a statement. I bought goods on my own credit.
Q. I speak of those to whom you owed money. Did you not frequently say to them that your brother was a rich man and your financial backer?
A. I stated that he endorsed for me to some two or three parties.
Q. In our original examination before the referee, did you not state there that your brother had been your financial backer for seven or eight years, and you had so informed your creditors?
A. The deposition in that case will show what I stated.
Q. And what you said then was correct?

A. Yes, sir.

Q. You stated a little while ago that all of the paper at the Syracuse National Bank, the paper on which your brother was endorser, was renewed every sixty or ninety days?

A. Yes, sir.

Q. And the paper you owed to banks and persons in Chattanooga upon which he was endorser was, in like manner, renewed every sixty or ninety days?

A. Yes, sir.

Q. In renewing this paper, you of course had to write to your brother, did you not?

A. He sent me notice when it would be due and I sent him on my paper.

Q. And when the paper was due down here, you sent him new paper to get his endorsement?

A. Yes, sir.

Q. So since 1896, you have been in constant communication with your brother for the purpose of having paper renewed, of procuring loans and accommodations from him in the way of endorsements, have you not?

A. Yes, sir.

Q. State whether or not during that time you have not very frequently had occasion to draw on him, or to seek aid from him, in getting small sums of money to meet interest charges and personal liabilities in Chattanooga?

A. I have paid the interest on paper we had here. I did not have to draw on him for interest.

Q. As a matter of fact, during the last five or six years, have you not frequently drawn on him for small accommodations?

76 A. The statement made will show just what I have drawn on him for.

Q. If you made in your original examination the statement I have just suggested, that statement was correct?

A. Yes, sir.

Q. And you have borrowed a number of sums during the last four or five years to meet interest charges in Chattanooga?

A. The statement will show all that.

Q. Did you not state in your original deposition that independent of that statement you had gotten a number of small accommodations in the way of loans?

A. Never except what is stated in that report.

Q. This report only shows, Mr. Merriam, what obligations you paid on the first of June out of the funds coming from the purchase price of the Cumberland County land. It does not pretend to show what debts you paid prior to that time. Now, isn't it a fact that between the first of June, 1903, and September, 1896, you did procure various small loans from your brother, and accommodations, and either paid them, or incorporated them in other notes—loans which are not described or mentioned in this statement?

A. Nothing, only the Chattanooga National Bank. I owed them. I paid them two or three thousand dollars to reduce the indebtedness.

Q. When did you pay that?
A. Some time ago.
Q. Was your brother endorser on that too?
A. Yes sir, I paid it out of the business here.
Q. Was that money paid within the last four months?
A. Yes, sir.
Q. Where did you get the money?
A. Out of my business here.
Q. Now, Mr. Merriam, as a matter of fact, has your indebtedness decreased at all since 1896, in the aggregate?
A. Not in the aggregate.
Q. As a matter of fact, hasn't it considerably increased?
A. I owed more before I sold the land than I did in 1896.
Q. You were engaged in no other business than that of wholesale grocer, were you, during that time?
A. No, sir.
Q. And your only source of income consisted of the business and the rents from your real estate?
77 A. Yes, sir.
Q. How much rent did you receive from your real estate?
A. About $1,000 a year.
Q. From what property did you get that rent?
A. From the property on Montgomery Avenue.
Q. How much per month?
A. About $35 or $50 per month, on the property Mr. Probasco had a mortgage on.
Q. During the last six years, has your business as a wholesale grocer been conducted at a profit or at a loss?
A. At a loss.
Q. Do you know the extent of your losses each year?
A. I don't know. The business has not been paying with the interest I had to pay. The grocery business, until the last year, probably paid for itself, if I had not had so much interest to pay.
Q. But in taking out of the business the interest you had to pay in Chattanooga, at no time since 1897, has your business been otherwise than a losing business?
A. I made money the year the army was here, 1898.
Q. Everybody had money that year. So that at the time of filing the petition in this cause, your stock had dwindled down until it was not worth more than $1,000?
A. I think they valued it at about that.
Q. Has your stock of goods been substantially larger than this at any time within the last three years?
A. Yes, sir, it has been considerably larger.
Q. When?
A. It is smaller now than it ever was before.
Q. Have you at any time during the last three or four years had a larger amount of stock on hand than three or four thousand dollars?
A. I have had as high as five, six and seven thousand dollars within the last three years. Have had as much as $7500 sometimes.

Q. When was that, Mr. Merriam?

A. Two years ago I had that, I think.

Q. At what time?

A. The first of the year.

Q. Was that amount larger then than the year previous?

A. No, sir, it was not. I never carried less than a $7500 stock up to three years ago.

Q. And you have been running down gradually since then?

78 A. Yes, sir.

Q. What was the value of the stock of goods you had on hand at the time Merriam & Storey dissolved partnership?

A. The invoice was taken the first of January before—I don't recollect what it was. I was at the North when the invoice was taken.

Q. Do not your books show the value of the mechandise you had at that time?

A. I suppose they would.

Q. Will you file a statement of that invoice copied from your books?

A. I can.

Q. Refresh your memory, Mr. Merriam, isn't it true that the value of the merchandise on hand at that time was between twelve and fifteen thousand or twenty thousand dollars?

A. I think it was.

Q. Isn't it further true that the value of the amount of bills and accounts receivable was between thirty-five and fifty thousand dollars?

A. The statement shows that.

Q. So then, since 1896, the time the firm of Merriam & Storey dissolved partnership, the assets of the firm of Merriam & Co., dwindled down to practically nothing?

A. The statement shows just what it was.

Q. Isn't it a fact that at no time since January, 1897, to the 9th of June, 1903, has the value of your assets taken at a reasonable market value been anything like equal to the amount of your liabilities?

A. I hoped that by——

Q. I am not asking you what you hoped them to be worth, but what in fact they were worth, according to market value at that time?

A. I think the property was worth considerably more than what it brought, and that I could have realized, if I had been allowed to make sale of the property, a great deal more than what we got for the property.

Q. You have not answered my question, Mr. Merriam. I didn't ask you whether the trustee had gotten out of the sale of the real estate in this cause its reasonable value or not, I asked you whether or not the reasonable market value of all your property since the first of January, 1897, to the 9th of June, 1903, was not less than the total amount of your liabilities of every kind?

79 A. I did not so consider them at the time.

Q. I didn't ask you what you considered, or what you thought at the time, I asked you as a fact, has there been any time between those dates when the reasonable market value of your property was equal to the amount of your liabilities?

A. I think the property was worth what I owed, at one time.

Q. When was that time, Mr. Merriam?

A. In 1897, though I could not have sold it then at any price.

Q. Then if you could not have sold it at any price, how do you figure its market value equal to your liabilities?

A. If the property had been put upon the market it would have brought more than enough to pay my liabilities.

Q. Has there been any time since January, 1897, when your real estate in Chattanooga had a higher market value than it had the first of June this year?

A. I think I could have sold it at private sale for more money than it brought.

Q. I didn't ask you that question, Mr. Merriam. I asked you if there was any time during the period just mentioned when its market value was greater than on the first of June this year?

A. It could not have been sold for any more.

Q. But that is not answering the question as to the market value. Isn't it a fact that the market value of real estate in Chattanooga this year has been higher than at any time since 1886, or 1887?

A. Property, many times, is worth a great deal more than it will bring.

Q. Since the first of January, 1897, you have really been insolvent, haven't you, Mr. Merriam?

A. I don't think I was insolvent.

Q. What do you understand by insolvency?

A. When your property is worth what you owe—not always what it will bring at a forced sale.

Q. But have you at any time during this period, had enough property, which at a reasonable market value could have been said to equal the amount of your liabilities?

A. I consider that I have.

Q. Now state what you consider the value of that property and the extent of the liabilities it would have covered?

80 A. Sometimes property won't bring what it is worth. For instance, on some days stocks will bring hardly anything on Wall Street, but that would not be considered the real value of the stock. It is just the same with other property.

Q. I am not talking about Wall Street. Point to me when since January, 1897, your property was worth more than your liabilities, and why it was and how it was so?

A. I can explain this by stating that I was offered for my coal land an option of $5,000 for $200,000.

Q. For your interest, or for yours and Mr. Jarnagin's?

A. My interest and Mr. Jarnagin's. Mr. Coffman was offered an option of $5,000 cash on the coal property for $200,000.

Q. Was that option for your interest alone, or yours and Mr. Jarnagin's?

A. For Mr. Jarnagin's and mine.

Q. Did you sell the property at that time for $200,000?

A. He didn't accept the option.

Q. And you never did sell it for $200,000?

A. No, sir.

Q. And this is the only explanation you have to give in answer to my question that you explain when and how it was that your property at any time since January, 1897, was worth more than your liabilities?

A. My home property was valued at $6500, and has been estimated by other parties to be worth $8500, according to the way property has been sold around here. I can not mention any property which has been so sold, but I know that according to the way land has been sold near me, my land ought to have been worth $8500.

Q. Is your home property more valuable than the property of Mr. Peak on the same street?

A. Yes, sir, it is different property. Mr. Peak has 40 front feet and runs back 200; I have 80 front feet and runs back 275, with a large amount of shade on it, and there is no shade on his.

Q. You have an old house, and he has an excellent new house?

A. Yes, sir.

Q. So that is the only explanation you have to give in answer to my question?

A. According to the way property has been sold around town, I think my property was good for my liabilities.

81 Q. Mr. Merriam, there has been considerable business revival in this section of the country during the last two years?

A. Yes, sir, business has been better.

Q. Real estate has revived to some extent by reason of this revival?

A. Yes, sir.

Q. And yet, four years ago, when you could not have sold at any price, your real estate was worth, together with your stock of goods, more than your liabilities?

A. I think it was at that time.

Q. Was your real estate worth more?

A. No, sir, I don't consider that it was worth more.

Q. As a matter of fact, wasn't it worth less?

A. I don't suppose it could have been sold for any more.

Q. Now what was the extent of your merchandise at this time?

A. I don't think it exceeded $7,500 at that time.

Q. Then, as a matter of fact, if your schedule did not exceed $7,500, and your real estate was worth less than it was the first of this year, it follows that you were insolvent, does it not?

A. I had some losses which I paid—endorsements I made myself—amounting, at different times, to $10,000.

Q. You mean accommodation endorsements to other people?

A. Yes, I made them some time ago, and I paid them.
Q. How long ago were they made?
A. About the time of the boom.
Q. In '86 or '87?
A. Yes, sir.
Q. And you had to pay some of them off since?
A. Yes, sir.
Q. And the money you have used in paying off these endorsements you borrowed either by mortgage on your property or out of your business?
A. Yes, sir.
Q. So that the relative quantity of your assets and liabilities has not materially changed within the last six or seven years, has it?
A. Not the value—only the money that I have taken out to pay other indebtedness.
Q. The relative proportion of your debts and your assets, as a matter of fact, have not changed during the last seven or
82 eight years, except that your libilities have grown in amount and your assets have decreased in amount, isn't that correct?
A. Yes, sir, as I stated, I was security for and paid about $10,000, which was taken out of the business and made my liabilities more.
Q. But you have already explained, have you not, Mr. Merriam, that these security obligations were not of recent origin, but dated back as far as '88 or '89?
A. No, sir, the amount that I owed to my brother, part of it has been made in the last two years.
Q. You don't seem to have comprehended my question. I didn't ask you about what you owed your brother, but whether or not the accommodation debts that you had paid for others were not debts that originated back as far as '88 or '89?
A. The endorsement which I paid was on a note for $3,080 at the South Chattanooga Bank, and was made about five years ago.
Q. Was the note at the bank made five years ago, or did the endorsement originate at that time?
A. The note was made about five or six years ago.
Q. Made to whom?
A. I endorsed the note for Mr. Wilhoit.
Q. Five or six years ago?
A. Perhaps seven years ago. I had it renewed from time to time, and I paid it all up except about $75 or $80.00.
Q. And the other surety debts you spoke of dated back as far as '88 or '89, did they not?
A. I think about that time.
Q. Now, Mr. Merriam, in your schedule of assets, filed with your petition in bankruptcy, you set forth a large list of accounts receivable, aggregating something like twenty or twenty-five thousand dollars. As a matter of fact, practically all of those accounts are of long standing, are they not, and worthless.
A. Part of them, yes, sir, not all of them.

Q. I didn't ask you about all of them, I asked you about the larger part of them?

A. I think the biggest half of them, yes, sir.

Q. As a matter of fact, the trustee has been able to collect not over $800 or $900 out of these accounts?

A. I think he has collected more than that. I have not seen him this week, but I think he has collected from $1,000 to $1,500.

83 Q. At all events, he has not collected more than $1,000 out of this list of accounts which you filed with your schedule?

A. Probably not.

Q. How far back do many of these accounts date, Mr. Merriam?

A. Some of them date back as far, I expect, as 1887.

Q. And farther?

A. I can't say as to that.

Q. And they have been carried on your books as assets ever since?

A. We had the notes as assets.

Q. Now, when you filed your petition in bankruptcy, the taxes on practically all of your real estate had been delinquent for some time?

A. Not on the store, I had paid up the taxes on the store property and the property on Market street—just taxes for last year.

Q. Were you not delinquent in your taxes to the extent of nearly $1,000?

A. The city and county taxes on the store amounted to over $300—that was paid.

Q. I am not asking you concerning any particular piece of property, but all of the real estate scheduled among your assets. Were not taxes on that real estate to the amount of about $1,000 delinquent?

A. I think so.

Q. Hadn't some of your real estate been sold by the State because of your failure to pay taxes?

A. Yes, sir.

Q. Hadn't your home on Vine Street been sold?

A. Yes, sir.

Q. And the two years' time of redemption had nearly expired?

A. Nearly expired.

Q. Were you not also largely delinquent in the payment of insurance?

A. No, sir, I was not.

Q. Did you not owe several hundred dollars on account of delinquent insurance?

A. No, sir, not several hundred.

Q. But you were delinquent to some extent in the matter of your insurance?

A. To some extent on insurance taken out only a short time ago.

84 Q. Now, Mr. Merriam, for some years your brother Tom Merriam, in New York, has known that you were very hard up, has he not?

A. He has known that I owed considerable money.

Q. Has he not also known that you were finding great difficulty in meeting your obligations?

A. Why he has known from the fact that I was borrowing money from him that I owed considerable money.

Q. Have you not frequently importuned him for money, to renew your paper and endorse your paper for several years?

A. He has been renewing over and over as shown by the statement.

Q. Has he not, in fact, known you were very hard up for five or six, and especially for four or five years?

A. I suppose he knew that I owed a good deal of money.

Q. When you were examined before the referee and creditors in this cause sometime in June last, you stated that he knew pretty well the state of your financial affairs?

A. Some statement of that kind, yes sir.

Q. I hand you, herewith, what purports to be a copy of your examination on that occasion, which is signed and sworn to by you. I ask you to turn to page 39 of that deposition and state whether or not you were asked this question: "He knew you were very hard up, didn't he?" and you answered: "He knew I needed money, of course." Next question is: "And he had known that for some time?" and you answered: "Yes, sir." "And he practically backed you, didn't he, in all of your business?" and you answered: "Yes, sir, he backed me." Look at that deposition, and state whether or not I have read correctly therefrom?

A. I make the same statement now.

Q. Hasn't your brother known for some time the extent and nature of your real estate holdings in Chattanooga?

A. Yes, sir; he knew I had considerable property here.

Q. And he knew, generally, what the property was?

A. He had seen the store and my home. He didn't know where the other was located.

Q. Didn't he know where the property on Montgomery Avenue was located?

85 A. I don't think he did.

Q. Didn't you take him to see the Montgomery Avenue property two years ago?

A. He was not here two years ago.

Q. When was he here?

A. Nearly four years ago.

Q. In your examination before the referee, you stated it was two years ago.

A. I made a mistake.

Q. You think now it was four years ago?

A. Yes, four years ago.

Q. Did you not, in that examination, state that on the occasion of your brother's visit you took him out to Montgomery Avenue and showed him the property?

A. My brother and I were riding out, and I told him that I owned six lots of that property there. I didn't take him out there for that purpose. I just said to him, as we were riding by, "Brother, I own

that property there—six of those lots." That is the explanation of the statement I made.

Q. So for some time he has known generally the extent of your real estate holdings in Chattanooga, as well as the stock of goods in your store on Chestnut Street?

A. Yes, sir.

Q. When he was here three or four years ago, did he not know how you were fixed financially?

A. I told him I owed eighty-five to one hundred thousand dollars.

Q. Did he know your financial condition at that time?

A. Yes, sir.

Q. Did you not, during that visit, explain to him, how you were fixed financially and how you stood?

A. I told him what property I had would more than pay off my indebtedness if I could hold it and sell it myself individually.

Q. And in speaking of your property, you also referred to the coal land in Cumberland County?

A. Yes, sir.

Q. What did you expect them to get for that property?

A. We were asking $20 an acre. We had an option offered us at that price at that time.

Q. How much commission were you to pay if the property had been sold then at $200,000?

A. Ten per cent.

Q. So you expected to get the net sum of $180,000 out
86 of the sale of that coal land at that time, if you got for it the price you were asking?

A. Yes, sir—$90,000 for my part.

Q. And $90,000 for Mr. Jarnagin?

A. Yes, sir.

Q. If the sale had occurred, Mr. Jarnagin would have gotten one-half and you one-half?

A. No, sir, I had done all the work, and Mr. Jarnagin said as I had done considerable work, he would give me $2500 more than one-half. The Brown Mining Co., wanted 5,000 acres.

Q. This offer of Mr. Jarnagin's was on account of your having done more work?

A. Yes, making openings and attending to the correspondence.

Q. This 5,000 acres for which you had this tentative offer was a choice part of the land, was it not?

A. Yes, sir. I did not get quite through. I was going to state that Mr. Tarwater stated that they would not let $5,000 break the trade, that they would give $5,000 more rather than not get the property. We declined to let them have the property for less than $25.00 per acre.

Q. And the trade did not go through?

A. No, sir.

Q. Now, in your examination before the referee, wasn't this question asked you by Mr. Gaines: "Of course he was familiar with your situation, and knew how you were fixed financially?" and you answered: "yes, sir." Examine the record and see if that is correct?

A. Yes, sir. But the next question was answered by me: "Yes, sir, something about it."

Q. Didn't Mr. Gaines ask you this further question on the same page: "He knew you were hard pressed?" and did you not answer: "Yes, sir?"

A. That is correct.

Q. Wasn't that a fact?

A. Yes, sir.

Q. Now, during the last four or five years, have you not drawn on your brother whenever you needed money and needed it badly?

A. I have drawn on him when I needed money, yes.

Q. You have done that from time to time, and many times?

A. Yes, sir, from time to time.

87 Q. Now, has your indebtedness increased any since your brother was here, except on account of the accumulation of interest which you were unable to pay?

A. Since he was here four years ago, yes, sir.

Q. To what extent has it increased, and what has been the cause of the increase of indebtedness since that time?

A. It has increased from five to ten thousand dollars in the last four years.

Q. But you have not explained what was the cause of that increase?

A. I have had security notes to pay, as I explained—one note of $3080 at the South Chattanooga Savings Bank. That was paid mostly within the last four years.

Q. But you have already stated, Mr. Merriam, that that was an indebtedness that originated five or six years ago?

A. But it was not paid. I carried it in the bank. It was paid along from time to time and renewed.

Q. But I have not asked you what you paid within the last four or five years, I asked you what has been the cause of the so-called increase of indebtedness since your brother's visit?

A. It was on account of my paying that note.

Q. Well, if you paid that debt by borrowing from Peter to pay Paul, it didn't increase the amount of your indebtedness, did it?

A. No, sir; it didn't increase it.

Q. And, as a matter of fact, your indebtedness has not increased within the last three or four years, except on account of the accumulation of interest you could not pay and taxes and insurance?

A. And my business.

Q. Do you mean to say that your business, independent of any demands upon it by reason of outside obligations, has failed to pay expenses?

A. No, sir; I didn't mean to say that.

Q. Even independent of demands made upon it to meet interest charges?

A. Not for the last two years.

Q. To what extent have you lost money in your business the last two years, outside of these demands upon it?

A. I have lost some debts, I expect I have lost $5,000 in what I lost in business and by poor debts.

Q. Were these debts created the last two years, or prior?
88 A. I expect about $1,000 a year was made within that time. There is no firm but had some losses.

Q. What has been the total volume of business done by your firm within the last two years?

A. I think about $50,000 a year.

Q. Do you mean to say that you have done a business of $50,000 a year within the last two years?

A. I don't think I have the last year, but I did about that year before last.

Q. You mean that within the last two or three years you have done that general amount of business, or do you mean that you have done that amount each year?

A. I think that amount each year until within the last two years.

Q. And less within the last two years?

A. I think so.

Q. Will your books show how much you have done?

A. Yes, sir.

Q. Will you file an Exhibit here to your deposition and mark it "C," containing a statement as shown by the books of business you have done at your store—an average for the last two years?

A. Yes, sir.

Q. When was the last time your brother was in Chattanooga?

A. I think he was in Chattanooga last January.

Q. What was the object of his visit here?

A. He came to look at the property.

Q. What property?

A. The coal land property.

Q. How long did he stay here?

A. The last time he was here, I think he was with Mr. Sisson. They were up looking at the property, and he came to Chattanooga and stayed with my family while I was up *up* there three or four days.

Q. Was you- brother at that time engaged in a trade with you for the property?

A. Yes, sir, he had some parties here looking at the property, and he was here with Mr. Robinson, Mr. Miller and Mr. Sisson, at one time.

Q. When was that?

A. Since last November.

Q. Since January.

A. He was here two or three times.

Q. During last year?
89 A. Since November when he took the option.

Q. When did he take that option on the property?

A. November—last Fall.

Q. And he has been here two or three times since that?

A. Two or three times.

Q. Was he here previous to that time and since his visit four years ago?

A. No, sir.

Q. How many times have you been to his place in New York within the last four or five years?

A. I have been there only once—the last of May, or first of June, when I sold the property. It has been seven years since I was there before.

Q. You say since 1896 or 1897, you have owed your brother the principal sum of $18,555.03?

A. Yes, sir.

Q. Which indebtedness was represented by fourteen different promissory notes or drafts?

A. Yes, sir; fourteen different notes.

Q. And during that time he has never called on you to pay one cent of interest on any of that indebtedness, has he?

A. No, sir; he did not.

Q. Has any of that paper been renewed since it was first made?

A. I think the schedule shows the original notes.

Q. Then, if that schedule shows the original notes, is it true or not that none of those notes have been renewed since they were originally made?

A. No, sir; I don't think those notes have been renewed.

Q. How long a period of time did those notes run—60 or 90 days?

A. Some of them ran one day from date. You can see there, they will speak for themselves.

Q. Examine the original notes and then answer my question?

A. I drew on him for these notes to make payments on notes I owed at the Chattanooga National Bank with his endorsement on them.

Q. But I am asking you about the notes that you made him in 1897 and 1898, as shown by that list, were any of those notes renewed?

A. They have not been renewed since that time. $10,000 has not been renewed since that time.

Q. Not renewed since originally made?

90 A. I took up other paper I owed him with that $10,000.

Q. I notice from that list you have some notes made as late as 1903—for what purpose were those made?

A. To take up notes due the Chattanooga National Bank with his endorsement on them.

Q. I notice from your statement that there was an indebtedness due the Merchants' National Bank of Syracuse, N. Y., in the principal sum of about $19,000. In the first part of your deposition you stated that these notes were originally made from four to six years ago, and that no interest had been paid on these notes, but that they were discounted every sixty or ninety days and the discount added to the new note. I will ask you whether or not your brother ever made any demand on you, at any time, for the payment of interest or discount on these notes at the Merchants' National Bank?

A. No, sir; he never did.

Q. Why was it, Mr. Merriam, that for a period of five or six

years, your brother carried you directly or indirectly through money loaned you by him personally and money procured on his endorsement from his own bank in Syracuse to the amount of $43,000, and never asked you during that time for one cent of interest?

A. For the reason that when I sold my coal lands, he was to have his pay out of the coal lands. He expected I would sell it before I did.

Q. You say that he expected to get his money out of the coal land?

A. He expected that he would be paid when I sold the coal land.

Q. Didn't he know that unless you sold the coal land, you could not pay him?

A. Yes, sir.

Q. Knew that was the only means by which you could pay your creditors and hope to get out of debt?

A. Yes, sir.

Q. And without the sale of that property you could not pay even the interest on the debts you had outstanding, didn't he know that?

A. This 43,000 I owed him was accumulating all along.

Q. I understand the cause of that, but that is not my question. Please answer the question?

A. I could not pay my indebtedness without the sale of that land.

Q. Still, you have not answered my question, Mr. Merriam, you will please read that question to him again.

91 (Question read to witness.)

A. I could not make payments without selling the land.

Q. You could not pay without the sale of that land?

A. No, sir; I could not.

Q. And your brother knew that?

A. Yes, sir.

Q. Your brother also knew that you owed large amounts to other parties?

A. He knew that I owed $85,000 to $100,000 four years ago.

Q. Did your brother expect to get his debt in full out of the sale of these coal lands?

A. Yes sir; I think he did.

Q. What did he think would become of the other creditors and their claims?

A. We believed we could sell the property for enough to pay the other debts?

Q. You don't know what he believed, do you?

A. I think he believed that.

Q. I am not asking for your opinion as to what he believed. I want to know if he expected to use the money coming from the sale of that property to the exclusion of the rights of all other creditors?

A. He never said anything about the other creditors. He simply stated that he wanted his pay from the sale of the land.

Q. Now, how could your brother believe that by the sale of that land all your creditors would be paid?

A. He believed that with the money I brought back I might be able to get an extension of time on a good many of them, and finally sell the other property and pay out.

Q. Then your brother did not believe that by the sale of the coal land you would be able to pay off your indebtedness?

A. All the indebtedness? No, sir.

Q. He only believed that by using it could you pay part on his debts and get extensions of time, and then trust to luck in selling the other property, and thus in some way pull out of the hole?

A. I expected to be able to do so; yes, sir.

Q. But as a matter of fact, when he found you could not do that, he took all the purchase price for his own use, and left nothing to other creditors?

A. The statement shows that I paid out over $12,000.

92 Q. We have already discussed that. As a matter of fact, did he not take up all the money coming from the sale of that property for his own exclusive use and benefit, and permit you to use none of it for the other creditors?

A. And in paying notes he was endorser on here.

Q. So in paying that, he was paying himself—or saving himself from liability?

A. Yes, sir.

Q. Mr. Merriam, I understand your brother claims to have had a deed of trust on this property—I mean this Cumberland coal property.

A. He had a deed of trust, yes, sir.

Q. When was that deed of trust made?

A. Made September 24, 1897.

Q. Was that the only deed of trust you gave on the property to your brother?

A. The only deed of trust he has had.

Q. Will you tell me the circumstances under which that deed of trust was made?

A. I was owing him about this amount—about $35,000—and I gave him a deed of trust for that amount to secure what I owed him and the endorsements he had made.

Q. Did you do that at his instance or request, or voluntarily?

A. I did it voluntarily to give him security on what I owed him.

Q. You volunteered yourself, and not at his special instance and request? Who drew that deed of trust?

A. Mr. Dorton, at Crossville.

Q. Who is Mr. Dorton?

A. He is our lawyer at Crossville.

Q. Where is Crossville?

A. In Cumberland County, Tennessee.

Q. It is a little town up in Cumberland Mountains, is it not?

A. Yes, sir.

Q. And you sent up there to have the trust deed drawn?

A. He had been our attorney, and I sent up there for him to draw the deed of trust.

Q. After the deed of trust was drawn, did you execute it, together with your wife?

A. Yes, sir.

Q. What did you do with that deed of trust?

A. I kept it a number of years, until my brother was here four years ago.

93 Q. You kept it in the safe at your store until that time?

A. Yes, sir.

Q. Who was trustee under that deed of trust?

A. Thomas N. Merriam.

Q. Who is Thomas N. Merriam?

A. My oldest son.

Q. How old was he at that time?

A. About twenty-nine or thirty years old.

Q. Where was he living at that time?

A. He was traveling for me at that time—he was in the newspaper business up to that time, he might have been then—but I think he was with me.

Q. Did you deliver to him the deed of trust at that time?

A. He got it at that time.

Q. At what time?

A. When my brother was here.

Q. I am speaking of the time that the deed was first prepared and executed.

A. It was not turned over to him then.

Q. Did he know about it?

A. I told him—I told him it was in the safe.

Q. Who had him appointed trustee—you, or was it done at the request of your brother?

A. We agreed upon him mutually that he should be trustee.

Q. Who agreed mutually?

A. My brother and myself.

Q. Did you require him to give bond?

A. No, sir.

Q. Is he a man of any property?

A. Yes, sir, he has some property.

Q. Did he have any at that time?

A. Some, I don't know how much.

Q. Very little, wasn't it?

A. Probably $1,500, at that time.

Q. Did you execute a note to your brother at that time for $35,000?

A. I sent him the note.

Q. Did that not represent the principal of the amount you owed him, or was it intended as collateral security?

A. It was intended as collateral security.

Q. Was the trust deed given to secure this note as collateral security?

A. Yes, sir.

94 Q. Has that trust deed ever been put of record?

A. No, sir.

Q. Was there any agreement between you and your brother at that time as to whether or not you should put it of record or keep it from record—if so, state what that agreement was?

A. I stated that I would not put it on record just at that time, but would do so whenever he wanted it done.

Q. It was agreed that you should hold the trust deed and that it should not be put of record until such time as your brother might demand for his protection?

A. Yes, sir.

Q. And as a result, since the 24th of September, 1897, you have kept that trust deed at your store in this city; it has never been to New York; never been delivered to your brother, and never put of record?

A. I said that at the time I delivered it to him he turned it over to my son.

Q. When was that?

A. Four years ago.

Q. Where has your son been since then?

A. Traveling for me.

Q. Hasn't your son kept it?

A. I think he had it in his trunk. I had not had the deed of trust in my hands since my brother was here until I saw it since this cause commenced.

Q. And during the last three or four years it has been in the possession of your son, and not in the possession of Mr. Tom Merriam?

A. Yes, sir.

Q. Where has your son kept that trust deed, Mr. Merriam?

A. I don't know where he has kept that deed of trust.

Q. Where does your son live?

A. He has been living in my house.

Q. And if he has kept it in his trunk, as you have just now stated, he has kept it at your house?

A. Yes, sir, I think so—I don't know exactly where he has kept it.

Q. Mr. Merriam, isn't it a fact that since that trust deed was executed any knowledge of its existence has been kept from your creditors, by yourself, your brother and your son?

A. I mentioned it to Mr. Montague, and Mr. Jarnagin knows about it.

95 Q. When did you mention it to Mr. Montague?

A. Three or four years ago, I mentioned it to him twice.

Q. How did you happen to mention it?

A. I was telling him that my brother was security.

Q. Mr. Montague had been carrying you and your brother for a number of years in the First National Bank of this city, had he not?

A. He carried some notes my brother was endorser for.

Q. And he was demanding payment of these notes endorsed by your brother?

A. He never made any demand at all.

Q. You told Mr. Montague about the trust deed in order to

reassure him, in order to satisfy him that the notes were good and would be paid some time or other?

A. I told him one day that I had given my brother a deed of trust.

Q. Why did you tell him that, Mr. Merriam, and not your other creditors—please state the circumstances under which you told Mr. Montague this fact?

A. It was on account of my owing the first National Bank and my brother being security on these notes. I mentioned it to him, he didn't ask it of me, though.

Q. And your last answer is an exact statement of the circumstances under which you told Mr. Montague of the existence of that trust deed?

A. To my best knowledge and belief.

Q. Isn't it a fact, Mr. Merriam, that he informed you that it was his purpose to reduce to judgment the notes he had and enforce payment from you, if he could, by law, and you explained to him that he could not do it, because you had no property subject to execution, that it was all encumbered by mortgage, including the Cumberland County property, upon which there was a trust deed in favor of your brother?

A. Never any conversation passed between us directly or indirectly as your question calls for.

Q. Did any conversation like that take place?

A. Never anything of that kind.

Q. When did you tell Mr. Jarnagin, your partner, about the existence of that trust deed?

A. About two years ago.

Q. How did you happen to tell him?

A. I told him that I had given my brother a deed of trust on that property.

Q. Did you tell any other person outside of your family?

96 A. No, sir, I don't think I did.

Q. As a matter of fact, have you not frequently told your creditors who were pressing you for the collection of claims that your Cumberland County coal property was free from encumbrance, except for a small debt due the Chattanooga Savings Bank, that you were covering up nothing, and that you could pay them in full whenever you sold that property?

A. I never have.

Q. Have you not by means of these representations kept your creditors from bringing suit and from collecting by law such debts as they might have against you as far as you have property subject to execution?

A. Never have.

Q. Do you know Mr. Kalb, manager of R. G. Dun & Co., here?

A. Yes, sir.

Q. Do you know N. Dietzen?

A. Yes, sir.

Q. Are you acquainted with Mr. Byron Tatum, attorney at law?

A. Yes, sir.

Q. Did you not state to Mr. Kalb, manager of R. G. Dun & Co., within the present year, that your Cumberland coal property was free from liens, except a small trust deed in favor of the Chattanooga Savings Bank, that you expected to sell that property, and when you did, the proceeds would pay all your debts?

A. No, sir, Mr. Kalb asked me the question, and I told him it would not.

Q. What did he ask you and what did you tell him—explain in full?

A. He was in a number of times to see me and asked me about the sale of this property. I told him I believed I would be able to sell the property soon. I told him the circumstances and why I had my reasons for believing I would sell the property, and he says, "That would put you in good shape?" He asked me the question, he did that two or three times, and said, "I think it will put me so I will be able to go on with my business, and to finally pay out of debt."

Q. Mr. Kalb, as manager of Dun & Company, has had many inquiries concerning you financially within the last year or two, hasn't he?

A. Perhaps so; he has never mentioned it to me, I don't think, he has, he may have done so.

97 Q. During this conversation to which you refer, you didn't tell him that the proceeds coming from the sale of that land would enable you to pay all your indebtedness?

A. I told him it would not.

Q. You are indebted to the firm of N. Dietzen & Bro. in the sum of one or two thousand dollars, are you not?

A. About one thousand dollars.

Q. Hasn't that firm frequently for the last year or two sought to collect that debt?

A. Yes, sir.

Q. At one time they put the notes into the hands of an attorney?

A. Yes, sir.

Q. Was suit brought on those notes by the attorney?

A. No, sir.

Q. Why not?

A. Because I told them I would try to sell my coal property and arrange to pay it.

Q. Didn't you tell Mr. Deitzen that when you sold your coal property, you would be able to pay the debt?

A. No, sir.

Q. Didn't you say you would be able to pay the debt due his firm?

A. I told him I would try to do so.

Q. You say you are acquainted with Mr. Tatum, attorney at law, Jasper, Tennessee?

A. I am.

Q. Has he not had in his hands for collection a large claim against you for several years?

A. Yes, sir.

Q. Did you not tell him during the present year, at your store, that you only owed $4,500.00 on the coal land, meaning the Cumberland coal land?

A. No, sir; I did not.

Q. You made no such representation?

A. No, sir.

Q. Did you not represent to him on another occasion that when you sold your coal lands, you would pay your entire indebtedness, that you were worth $75,000.00 more than your liabilities, seeking by this means to secure further extension on the obligations he had against you?

A. No, sir.

Q. State whether or not in your examination before the referee, Mr. Tatum, did not ask you the following questions, and if
98 you did not answer those questions in the following manner: Didn't Mr. Tatum show you a letter purporting to be written by you to him concerning the Vann debt, which letter bore date April 13, 1900, did he not ask you to identify the letter, and to state whether or not you didn't say in that letter: "I have at least $75,000.00 more than I owe, and nothing is covered up?" And did you not answer, "I wrote that letter?"

A. That is correct.

Q. And you wrote that letter, and it did contain that statement, Mr. Merriam?

A. I think it did.

Q. Didn't Mr. Tatum also ask you this concerning it: "Did you not further state in that letter as follows—"Mr. Jarnagin and myself own a large body of coal land and only owe $4,000 on it," and didn't you examine the letter and state that you wrote the letter in question?

A. I did.

Q. Did you so write in that letter?

A. I think I did.

Q. Did you not on October 31, 1900, write directly to Mrs. Vann, and in that letter state as follows: "I have two dollars for every one I owe, and will now in a short time be able to pay you. I now expect within sixty days to have my land sold and the money," and didn't you conclude that letter as follows: "Look at this matter in the right light and withdraw the note from Mr. Tatum's hands?" I hand you what purports to be the letter in question, filed as exhibit to your testimony taken before the referee, and ask whether or not you wrote that letter, and whether or not that letter contains the statements I have just asked about?

A. I wrote this letter, and it contains the statements you mention.

Q. Now, Mr. Merriam, when was the mortgage of $4,000 to the Chattanooga Savings Bank, made by yourself and Mr. Jarnagin, first executed?

A. I don't recollect the date of that, Mr. Lancaster.

Q. About five or six years ago?

A. Probably.

Q. Was it made before or after the date of the trust deed you have recently spoken of as given to your brother?

A. Made before.

Q. Are you certain of that?

A. I think so—I am not positive.

Q. Who has the original deed of trust in question?

99 A. For the $4,000?

Q. Yes.

A. I don't know positively. They had it at the Chattanooga Savings Bank—I don't know whether it was turned over to Mr. Jarnagin or not.

Q. Will not Mr. Sadd know when that deed of trust was executed?

A. Yes, and perhaps Mr. Jarnagin will.

Q. That deed of trust was recorded in Cumberland County?

A. Yes, sir.

Q. For what period of time was the loan, secured by that trust deed, made to run?

A. I think it was made to run three years at first, and then renewed from time to time.

Q. Did you, when you made that trust deed to the bank, say anything about having executed a prior trust deed in favor of your brother?

A. I stated that this was made before.

Q. But whether made before or after, did you say anything to the bank about the trust deed in favor of your brother?

A. No, sir; I did not.

Q. But if it was in existence, you made no such statement?

A. No, sir.

Q. Had you, at any time prior to the filing of the petition in bankruptcy in this cause, given the bank any information concerning this trust deed in favor of your brother?

A. No, sir.

Q. During the last five or six years, you have made many efforts to sell this coal property, have you not?

A. Yes, sir.

Q. How many different negotiations have you had, looking to the sale of the property in question?

A. I could not say—three or four, at least.

Q. State whether or not any of these negotiations, before the sale to your brother, reached a point where the parties asked for an abstract of the title to the property in question?

A. Yes, sir; we gave an abstract, according to my best recollection now to Mr. Robinson of New York.

Q. When was that?

A. About three years ago, when Col. Sheridan had an option on the property.

100 Q. Did you not subsequently make a contract with some parties in Philadelphia to sell them the Cumberland coal property?

A. They had an option—they gave us a contract—they were to give us so much for the land.

Q. Did they make any inquiries concerning the title to the property?

A. They did.

Q. Did you furnish them an abstract of the property?

A. I don't think the Philadelphia abstract gave them the information with reference to it.

Q. I will ask you in furnishing this abstract, at the time Col. Sheridan was endeavoring to sell your property and in the information you gave the Philadelphia parties with whom you have a contract to sell the property, you told them anything about this unrecorded trust deed in favor of your brother?

A. I did not.

Q. Did you get your attorney to prepare an abstract of title?

A. No, sir; we didn't give them a regular abstract, we just gave what information we could get up outside.

Q. Who got this up for you?

A. We got up whatever was in it—gave certain information. I think Col. Sheridan saw an abstract gotten up years before by White & Sylvester.

Q. Did you ever require any attorneys in Chattanooga to give you a certificate of your title?

A. Not to my recollection, now.

Q. To refresh your memory, did you not get the firm of Pritchard & Sizer to furnish you a certificate of title and an abstract which you gave the Philadelphia parties and Mr. Robinson?

A. I don't recollect doing that.

Q. If you did get these lawyers to furnish you such certificate, and if they did furnish the certificate in question, do you know whether or not their certificate contained any statement about the unrecorded trust deed?

A. It did not. I don't think any certificate was gotten up.

Q. And those parties, and Pritchard & Sizer, nor any lawyers in Chattanooga, knew anything about the unrecorded trust deed?

A. They did not.

Q. Did the trade with the Philadelphia parties proceed
101 to a point where you and Mr. Jarnagin actually prepared and executed a deed to the so-called purchasers for the property on Cumberland Mountain?

A. I don't recollect it.

Q. Did you not execute them a deed and leave it with the First National Bank in escrow?

A. No, sir.

Q. If any of your negotiations with any of the parties to whom you were trying to sell this property in the last four or five years, have you made to any of them any statement concerning the existence of this unrecorded mortgage?

A. I did not.

Q. And when inquiry was made about the title, you said it was clear and unencumbered except for the trust deed in favor of the Chattanooga Savings Bank?

A. I don't recollect being asked about that.

Q. Didn't Mr. Robinson ask you about the title when Col. Sheridan was trying to sell the property?

A. I have no recollection.

Q. Didn't you say just now that inquiries were made about the title by the Philadelphia parties, and you told them there was nothing but the unrecorded deed to your brother?

A. I don't recollect answering such a question in that way.

Q. Have you not repeatedly told various parties in this city that the only encumbrance on your coal property was the $4,000 mortgage in favor of the Chattanooga Savings Bank?

A. I don't recollect telling anyone that.

Q. You did tell Mr. Tatum that that was the only encumbrance?

A. I wrote to him—I had reference to the recorded mortgage at that time.

Q. But you made no such distinction in your letter, did you, Mr. Merriam?

A. I don't think I did.

Q. And you did make to him the bare statement that it was not covered up, and that the only mortgage on the property was the $4,000 mortgage to the Chattanooga Savings Bank?

A. By its not being covered up, I had reference to the fact that there was no recorded paper by which my wife or I sought to keep from paying our debts.

102 Q. I didn't ask you what you had in mind, but simply what you said or wrote?

A. I wrote that.

Q. And you will not deny that you made a similar statement to other creditors in Chattanooga?

A. I have no recollection of making such a statement to other parties—don't think I was questioned.

Q. So you will not deny that you did make the statements referred to to the Philadelphia parties?

A. I don't think I made any statement of that kind.

Q. Did your brother in New York co-operate with you and aid you in any manner in your various efforts to sell this coal property?

A. He did not. I never called on him.

Q. When did your brother first take hold of the property for the purpose of selling it or buying it?

A. November 6th, 1902—I think that was the date.

Q. Did he come to Chattanooga at that time?

A. Yes, sir; he was in Chattanooga.

Q. How long did he stay on that visit?

A. We were on the mountain, I think, two days, I think he stayed here two days longer—one or two days.

Q. Did he stop at your house while here?

A. Yes.

Q. Did he visit your store on Chestnut street?

A. I don't know whether he did or not.

Q. Did you give him an option on the property at that time?

A. Yes, on Monday.

Q. Where is that option, Mr. Merriam?

A. I think Mr. Jarnagin has it.

Q. What was the price at which you put the property in that option?

A. $150,000 cash without commission.

Q. And if sold under that option, you were to get one-half and Mr. Jarnagin one-half?

A. Yes, sir.

Q. Was it under that option that the sale of June 1st, last was made?

A. Yes, sir.

Q. How many times was your brother in Chattanooga from the giving of that option to the closing of the trade?

A. Twice that I am sure of.

Q. Did he stay at your house on both visits?

A. Yes, sir; when in the city.

103 Q. Did he go to your store while in the city?

A. He was at the store I think, while I was away.

Q. Did he go to the land when he was here that time?

A. I met him at Rockwood, and I went with the parties. Mr. Sisson, I think, showed him the land and timber. He came down and stayed in Chattanooga while I was on the mountain, and when I got back he was here a short time and then went back home. I don't know how long he stayed exactly.

Q. Now in closing this trade with your brother, did he actually buy the property himself, or did he procure other parties to join him in buying the property and put up the purchase price?

A. He bought the property—it was deeded to him, and then had other parties prepared to go in with him.

Q. Who were the other parties?

A. Mr. Miller, of Corning, N. Y., was one of the principal men, Mr. Robinson, of Syracuse, Mr. Sisson, a lumber man from northern New York, and other smaller stockholders.

Q. Did the gentlemen just mentioned visit the property at any time during the last year for the purpose of examining it?

A. Mr. Miller and Mr. Sisson and Mr. Robinson saw the land.

Q. Do you know what interest your brother took in this syndicate he got up to buy the property?

A. I don't know positively—I heard them say that he took $75,000.

Q. Do you know how much they put up?

A. My brother and Mr. Robinson put up $75,000, Mr. Miller put up $75,000, Mr. Sisson put up $25,000 that is what I have been told—my brother stated that that was what they were going to do.

Q. And this amount they put up was to be used in paying the purchase price and to furnish the working capital for the new company to be organized to operate the property when bought?

A. That was my understanding.

Q. How old is your brother, Mr. Merriam?

A. About sixty years old.

Q. What is the condition of his health?

A. His health is not good.

Q. What is the matter with him?

A. He had an operation I think about a year ago or more—had the appendix taken out.

104 Q. State whether or not he has had an operation for cancer of the stomach?

A. No, that is the only operation I know any thing about.

Q. Do you know whether he is suffering from cancer of the stomach?

A. No, sir; I don't think he is.

Q. Didn't you state in your examination before the referee that he had been operated on for cancer of the stomach?

A. As I stated, the appendix was so decayed that they supposed it was cancer, but they took it out—that is the only operation I have ever heard of.

Q. So for the last year, your brother has been in a delicate condition of health?

A. His health has not been good.

Q. Now, did he go over the property much when he was here last November?

A. He went to the property in November, yes, and went over it.

Q. Who was with him?

A. Mr. Robinson and myself.

Q. Didn't Mr. Robinson, your brother and yourself ask Messrh. Pritchard & Sizer, at that time, to furnish an abstract if the title to your mountain land?

A. I think so.

Q. Didn't Messrs. Pritchard & Sizer promise yourself, Mr. Jarnagin and your brother that they would furnish such abstract of title?

A. They did—yes, sir.

Q. I hand you herewith what purports to be a letter press copy of the firm of Pritchard & Sizer, from pages 457 to 465, what purports to be a copy of the abstract of title in question which that firm furnished yourself and your brother and Mr. Robinson. I will ask you to examine it, and state whether or not that is a copy of that abstract in question?

A. I am satisfied that is a copy.

Q. You are satisfied that is a correct copy of the abstract Pritchard & Sizer furnished under the circumstances just stated?

A. Yes, sir.

Q. Mr. Merriam, I read the following from the conclusion of that abstract: "Messrs. Merriam and Jarnagin inform us that the

105 only encumbrance or lien against these lands now outstanding is an indebtedness of $4,000 in favor of the Chattanooga Savings Bank, secured by a deed of trust on said lands." I will ask you to examine the copy and state whether or not said copy contains that statement?

A. It contains that statement.

Q. Had you in fact so informed Messrs. Pritchard & Sizer, that the only encumbrance outstanding on the property was the lien in favor of the Chattanooga Savings Bank?

A. I don't recollect making any such statement to them.

Q. You cannot recall that you made such a statement?

A. No, sir.

Q. When the abstract was furnished, did you make any other statement to the contrary to Mr. Robinson, Pritchard & Sizer, or anyone else?

A. No, sir; Mr. Jaragin knew about it. I made no further statement.

Q. And you permitted the abstract to go out just in that manner?

A. Yes, sir.

Q. Wasn't it, in fact, the abstract furnished to you, and did you not have it in your possession and examine it?

A. I think I saw the abstract after it was made. I don't know whether I or Mr. Pritchard sent it on.

Q. You did see it after it was made?

A. Yes, sir; I think so.

Q. Recurring again to "Exhibit A," filed with this deposition which purports to be a statement of the moneys paid your brother at the time this trade was closed on June 1st, last, I want to call your attention to three notes, one made March 5, 1899, for $750; one February, 14, 1898, for $600; one February 23, 1898 for $750—were those notes originally made at that time, or in other words, were the debts represented by those notes originally created at the time those notes bear date?

A. I think I simply drew on my brother for the money and sent him the note. I think that is the case, I am not positive.

Q. Were those notes original loans at that time, or did they represent money that your brother at that time furnished you to take up other notes you had previously made upon which he was endorser?

A. I think they were made at that time.

106 Q. I notice from that statement a number of notes aggregating a good deal of money, bearing dates, January 5, 1903; March 11, 1903, April 11, 1903, April 3, 1903, Feb. 14, 1903, March 4, 1903, March 16, 1903, have you not heretofore stated that these notes were given your brother for moneys advanced by him at these respective dates to take up obligations in this city upon which he was endorser?

A. Not all of them, but part of them were given to take up notes he was endorser on at the Chattanooga National Bank.

Q. Why did you not pay those notes yourself?

A. I did not have the money.

Q. Did you so inform your brother?

A. He understood. I stated that Mr. Lyerly wanted the money and drew on my brother and he paid the draft.

Q. So during the year 1903, your brother was compelled to take up a number of notes in this city, as shown by that statement, upon which he was liable as endorser, and because you were unable to pay them yourself, and unable to get further extensions?

A. Such is the case.

Q. Isn't it a fact, Mr. Merriam, that during the year 1903 you

were practically unable to get any substantial credit in the purchase of goods for your store in any quantity?

A. No that is not so. I did get credit.

Q. Isn't it a fact that your orders for goods were frequently turned down?

A. No, sir; it is not.

Q. Did you not make inquiries, on a number of occasions, as to whether or not your credit was good, and were told that you could not get credit?

A. No, sir; I could have owed five times the amount I did if I had wanted the goods.

Q. Isn't it true that during that year you were harassed much by claims being put into the hands of attorneys for collection?

A. Some small claims were sent here.

Q. And by the further fact that in many instances after asking extensions on past due claims, you would have to give your check for small amounts several weeks or days in advance?

A. Not for several weeks. Might have done so for five days, or such a matter as that.

Q. And you were constantly solicited by attorneys to pay small debts sent here for collection?

107 A. Yes, sir; I paid most of them.

Q. Didn't your other creditors also solicit payment of their debts?

A. I generally paid them up—most of them—some accounts were past due, but I kept them up pretty well.

Q. Did you frequently say to your various creditors who were pressing you during that year that you had practically negotiated the sale of your mining property to your brother and as soon as you closed the trade would pay them in full?

A. I wrote to some parties that I believed I would sell the property in a short time.

Q. And you did get them to hold up by those representations?

A. I think some of them held up.

Q. And it was your purpose to pay them?

A. Yes, sir.

Q. Examine the schedule filed with your petition in bankruptcy in this cause, I mean the schedule showing the unsecured debts, and state how far back in time those debts go, by that I mean how old they are, and when they were originally created?

A. I should say with the exception of the J. L. Brown account and those of Storey and Weihl, that the accounts were all made within a short time. These merchandise accounts were all made within a short time.

Q. You mean within last year?

A. Yes, sir.

Q. Were any of those debts created prior to the 24th of September, 1897, if so, which?

A. I think Mr. Storey's account, the J. L. Brown account and perhaps the Wiehl account were made before that time.

Q. Those just mentioned are the only accounts that antedate the 24th of September, 1897?

A. Yes, sir.

Q. And all the other unsecured debts set forth in your schedule of liabilities were made subsequent to that time?

A. Most of them, yes, sir—I think all, in fact.

Q. You say it was your intention upon the sale of your Cumberland coal property, to pay your creditors?

A. It was.

Q. And when you left here for New York in May last to close that trade, it was your intention and purpose to use the money in paying off your various Chattanooga creditors?

108 A. It was my intention after my return to go on with my business, and gradually close out my indebtedness.

Q. Of the purchase price which you expected to realize from the sale of this property, how much of it did you, at that time, expect to pay your brother?

A. Well, he had told me that he wanted to get his accounts straight; that he wanted to close up his business on account of his health, but I was in hopes he would let $10,000 or $15,000 run awhile.

Q. Didn't you expect to satisfy him by paying him not more than $10,000 of the liabilities which were held against you in New York at that time?

A. No, sir.

Q. In your examination before the referee, did you not state that at the time you left for New York you expected that the debts which your brother was liable for in New York and the debts you owed him could be satisfied for the time being by paying $10,000 on account thereof?

A. No, I don't think I did.

Q. If you made such a statement, was it incorrect?

A. It was incorrect. I did not expect to make any such trade.

Q. How much money did you expect him to let you bring back?

A. I thought he might let me have ten or fifteen thousand dollars of the indebtedness.

Q. When you went to New York to close the trade in May where did you stop—at your brother's house?

A. Yes, part of the time, and with my sister part of the time, where my mother lives.

Q. When did you first ascertain from your brother that it was not his purpose to permit you to have the use of any of the purchase price of that property for the benefit of your creditors in Chattanooga?.

A. He stated in a letter that he wanted to close up the matter, that that was why he was buying the land, and when I got there, I think it was on Saturday before we closed the deal, he stated that he wanted to take out what was coming to him.

Q. How did that question arise?

A. He stated that I would have to take $65,000.00 cash and $20,000.00 of stock, and I suggested to him that if I had to do that, I expected to get $75,000.00 cash, and expected he would give me

ten to fifteen thousand dollars credit, and by doing so, that I
109 would be able to settle up matters here in such a way that I could finally settle with my creditors satisfactorily to all, holding out my real estate.

Q. Mr. Merriam, on the Saturday previous to the time the trade was closed, you were at your brother's house in Syracuse, were you not?

A. Yes, sir.

Q. Did you speak to him at that time about the note of $750.00 due the Chattanooga National Bank the following Monday morning, and upon which he was endorser?

A. He spoke about that. I had spoken to him before about it, and then when he came in from the meeting he spoke about it.

Q. But you were at his house on Saturday, and you asked him to give you a check for that particular note?

A. He proposed to send check himself to take up the note.

Q. To keep it from going to protest?

A. Yes, sir.

Q. Now, while that conversation was taking place in reference to that Chattanooga note, did you not also say to your brother that you would have to have other money for your Chattanooga purposes?

A. No, sir, not Chattanooga creditors. My son, who had charge of the books, etc., had written me that I had better, if I didn't come home right away, send him about $250.00. I got the letter that day, I think it was.

Q. Did you not state to your brother at that time that you would have to have other money for your Chattanooga purposes?

A. I stated that I wanted that amount of money.

Q. Didn't your brother, at that time, when you made that request, tell you he could not comply with it, and that it was his purpose to use the entire purchase price coming from the sale of that land in taking up indebtedness due by you to him, and obligations of yourself upon which he was endorser or surety?

A. He said he was going to take what was coming to him.

Q. And he wanted to be protected on account of these endorsements?

A. Yes, sir.

Q. And he refused to give you any more money that the amount necessary to protect the Chattanooga paper for $750.00?

110 A. He didn't want to pay any more.

Q. Didn't he say he would not pay any more?

A. I don't know about that; I'm not positive.

Q. Didn't you become indignant, and say if he didn't do what you wanted in that respect, you would not take any money from him at all?

A. I made some statement of that kind.

Q. And you did feel indignant?

A. I did. I thought he ought to let me have that small amount of money.

Q. You went from his house to your sister's house?

A. I went to stay with my sister over night.

Q. Now, when the trade was actually closed, and settlement was being made between your brother and yourself, did you object to paying him compound interest?

A. No, I did not.

Q. Didn't you go and inquire of an officer of the bank there whether or not it was lawful to charge compound interest?

A. No, sir; I knew it was allowed in New York.

Q. Didn't an officer of one of the banks tell you it was perfectly legal?

A. I didn't go into a bank while in Syracuse, that I can recollect.

Q. Didn't you state in your previous deposition before the Referee that you did make such inquiry?

A. No, sir; if that statement appears in my deposition, it was a mistake.

Q. Mr. Merriam, I hand you what purports to be a copy of your deposition given before the Referee in this cause, and I find it contains this statement in reference to this compound interest charged by your brother: "And he took all the law allowed him?" and your answer was, "Yes, sir; I inquired about it to be sure he done me right on that. Mr. Latta, President of bank, said the laws of New York allowed anybody compound interest. I told him I thought it was piling it on me pretty well, and he said the laws of New York allowed anybody to compound interest, but they will not allow you to take more than that. If you do, it ruins the note itself; you could not collect principal or interest." "Did your brother get all the law allowed him?" "Yes, sir." The next question is, "Did you object to that when he tried to charge you compound interest?" Answer, "I told him it was running it up pretty well on me, and he said that was what I would have to pay a bank in New York.
111 They do not allow any bank to charge over 6 per cent." Examine that deposition and state whether or not I have correctly read therefrom.

A. Yes, sir.

Q. Is that a correct statement of what you said at that time?

A. It is not as a whole.

Q. You did not make that statement, then?

A. They are mistaken, because as I want to explain to you in reference to Mr. Latta; he is President of this Brown banking concern of Pennsylvania, and he was here and he told me that in reference to this compound interest, that the State of New York had a right to charge under the law compound interest, that that was correct, and he was President of a bank in Pennsylvania. That statement is mixed; he was not President of a bank in Syracuse, and I never saw him until during my first examination. I had him to my house.

Q. Do you mean to say that the stenographer made a mistake?

A. I did not make that mistake, because I could not have made that, for Mr. Latta married a niece of mine, and lives in Pennsylvania. The stenographer got it mixed.

Q. Did you, in fact, in that examination, make the statement just quoted concerning what took place between you and your brother?
A. I did.
Q. Is that correct?
A. It is practically correct. There may be one or two little errors, but it is practically correct.
Q. When you were opposing this settlement with your brother, didn't you object to his expressed purpose of retaining so much of the purchase price, and didn't you say to him that you were short of funds to come back home with and meet your obligations, and did he not tell you he could not help it?
A. I did make some statement of that kind.
Q. I hand you what purports to be a copy of your deposition given before the Referee, and ask you whether or not it does not contain this statement: "Well, there was a note due here on the next Monday at the Chattanooga National Bank for $750.00, and I told my brother about it, and he said, 'You had better let me pay you, or give you a check and send it down there and take up the note,' and I told him that it would go to protest Monday, if it was
112 not paid, and I told him all right, I would need a little more money to send on, and he said, 'I can't give you any more money,' and I said, 'Well, I'll not take anything. I must have $75,000.00.' He said he had done everything in the world to get the trade through, and he had to get it through on that plan, and I told him that I was short of funds to come back here and meet my obligations. I went out to my sister's, and on Monday morning, went back to see my brother." Have I read correctly from the copy of your deposition given on that occasion?
A. Yes, you have read correctly.
Q. Did you make that statement?
A. I did.
Q. Is that statement correct?
A. I think it is.
Q. Now, Mr. Merriam, didn't you complain very bitterly of your brother to your mother and sister about the way your brother treated you up there, refusing to give you anything but this purchase price, and didn't you feel that he treated you badly, and exposed you to criticism, if not more of your creditors at home?
A. I believed my brother ought to have paid me the $75,000.00 in money, and I complained of that to him. I do not think I complained to my mother or sister. I might have related it to my sister, but not to my mother.
Q. Did your sister intercede in your behalf with your brother?
A. I didn't ask her to, I didn't want her to.
Q. Was she willing to intercede for you?
A. I don't know, she might have been. I don't think she was called upon to.
Q. Did she say anything to you about it?
A. No.
Q. Did you say anything to her about it?
A. No.

Q. Did you not complain to Mr. Robinson about it?
A. Mr. Robinson and I talked about it.
Q. What did Mr. Robinson say?
A. He said my brother had done the best he could.
Q. And what consolation did he give you, Mr. Merriam, when you told him you would have to come home without any money for your creditors?
A. I didn't tell Mr. Robinson that.

Q. Did your brother and Mr. Robinson tell you that you had better go home and do the best you could, and when they succeeded in digging the coal out of the mines, that they would give you a job to sell it?

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A. Mr. Robinson didn't. My brother had previously told me that they would make me the agent to sell the coal in Chattanooga.
Q. At the time you were complaining about the situation that presented itself to you up there, was not that the solace they gave you, to go home and close out, and they would give you a job to sell coal when they dug it, and see that you made some money?
A. Not at that time, but we had talked about it before.
Q. Didn't you say so in your previous examination?
A. I think there was a consultation between my brother and myself. He said Mr. Miller liked me, and if I got my business closed up satisfactorily, when they got to mining coal, they would make me their selling agent, but that was in a previous conversation.
Q. Didn't you state in your previous examination as follows: "They said I could come back home, and do the best I could to carry myself along until they got to operating the coal mine, and then they would make me a general agent for selling the coal, and to arrange my business here the best I could, and they would give me a position to handle their coal, and that I could make far more money in that way, etc.?"
A. Well, as I stated before, my brother said nothing about it at that time, but he had previously talked to me about it.
Q. Had given you such solace?
A. Yes, but there was no positive statement.
Q. Are you not now in the employment of the company organized by your brother?
A. I am not.
Q. Do you expect to be?
A. I don't know, I may sell coal, but there is nothing definite about it now.
Q. But you have the assurance from them that you may sell coal if you want to?
A. They have given me no assurance since I left them. I wrote to Mr. Miller, and to Mr. Sisson, but not to my brother.

Q. Now, Mr. Merriam, when this trade was closed in New York in June last, and settlement was made between you and your brother, was anything at that time said by either of you to each other in reference to this mortgage which purports to have been given on the 24th of September, 1897?

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A. No, sir.

Q. Nothing was said about that mortgage?

A. No, sir.

Q. It was not discussed?

A. No, sir.

Q. He just took the money, and squared up the debts you owed him, paid off the debts you owed at the Merchants' National Bank at Syracuse, and the balance of the money he gave to you only upon your promise as a man of honor that you would use it as he directed you to, namely in paying off paper in Chattanooga, upon which he was endorser?

A. Such was the fact.

Q. And you came to Chattanooga, and arrived here on the 3rd or 4th of June, and the 6th of June you went to your lawyer, and asked him to prepare your petition in bankruptcy?

A. I went and consulted with him.

Q. And the three days that elapsed between the time you arrived and the time you went to see your lawyer, you used in distributing the fund given you by your brother in the manner you had agreed to distribute it?

A. Yes, sir.

Q. How much did Mr. Jarnagin realize from the sale of this property?

A. He got $45,000.00 cash, and $20,000.00 in stock.

Q. So then, in the deal your brother obtained for his benefit, or your benefit, $20,000.00 in cash more for your half interest than for Mr. Jarnagin's?

A. He gave me $20,000.00 more than Mr. Jarnagin.

Q. Did Mr. Jarnagin know at the time this trade was closed that you- interest in the coal lands was realizing more than he was realizing from his interest?

A. He knew it.

Q. What did he say about it?

A. I would have to go back to tell you; it was away back.

Q. Is it not a fact that the first information Mr. Jarnagin ever received that your interest in the coal lands realized more than his interest, was when you testified to that fact before the referee in this cause?

115 A. No, sir.

Q. When did you tell Mr. Jarnagin for the first time that your brother was getting more for your interest in the coal lands than he was giving to Mr. Jarnagin?

A. I will have to make a statement to give that the right light. Mr. Robinson, with three nephews of mine was here to look over the coal property. This was after the contract was given us by my brother on the 9th day of November; I think it was in December, after returning from the mountain. Mr. Jarnagin and myself went on the mountain to show these parties the land; and the next morning after our return, Mr. Jarnagin stated to me, he says, "It looks as though this was going to be a family affair." I told him that if these parties bought the land it would be, but that he would be

treated right. "Well," he says, "what will you give me for my half interest in the land?" I said, "I have nothing to give, Mr. Jarnagin; it is not for me to make any proposition to you." Mr. Robinson was at my house at this time. Finally, Mr. Jarnagin says, "I am willing to take $55,000.00 cash for my interest in the property, provided I can be released from all obligation, except in the payment of my part of the indebtedness already made." I stated to him that I would see Mr. Robinson, and see what he had to say about it. Mr. Robinson stated that that would be all right, and the paper was drawn up to that effect, the next day, and from this time on, until about ten days before the sale of the property, to the best of my recollection this was the understanding. Mr. Miller had been down here a short time before, and went over the property with Mr. Robinson. He went back, leaving Mr. Robinson here. My brother was at my house, and they waited to hear from Mr. Miller from Saturday until the next Monday. Not getting an answer from Mr. Miller on Monday, they went back to the mountain, and went over the Western grant to look at the timber. While they were there, I received a letter for my brother from Mr. Miller. I forwarded this letter to my brother at Ozone. After receiving this letter, they telephoned me to meet them at Rockwood the next day. I went to Rockwood, and saw my brother and Mr. Robinson, and they told me about this letter from Mr. Miller. Mr. Miller in that letter stated that he would withdraw from the transaction, unless the property could be bought for less money, or something to that effect. My brother then stated that there would have to be a reduction of the price of the
116 land, if the trade went through, he would go home with Mr. Robinson, and stop at Corning, New York, and see what they could do with Mr. Miller. They returned home, and sent a letter to us, stating that they would make this proposition to us: That Mr. Jarnagin would have to take $45,000.00 cash for his interest, and $20,000.00 of the stock, and I think they stated in this letter that I would have to take $65,000.00 cash and $20,000.00 stock. We sent them a telegram in answer to this letter stating that Mr. Jarnagin accepted the proposition, in so far as he was concerned, but that I would not accept the proposition, that it must remain the same as it was before. I didn't mention the amount that I was to receive; Mr. Jarnagin knew all the time that I was getting more for the land than he was to receive?

Q. In the letter last referred to was anything said about the exact figure which you were to get for your interest in the property?

A. No, sir; I think not.

Q. The only exact figures suggested were in reference to the amount Mr. Jarnagin must take?

A. I think so.

Q. When you sent that telegram stating that Mr. Jarnagin would accept the offer made for his half, but that you would accept only the offer made you at Rockwood, did you at that time, or any time previous, or any time since, tell Mr. Jarnagin what that Rockwood offer to you was in dollars and cents?

A. No, I think nothing was said about that.

Q. And Mr. Jarnagin at the time he agreed to send that telegram with you did not know the figures referred to concerning your own interest when you spoke of taking the proposition made you at Rockwood?

A. I don't think he did.

Q. As a matter of fact, did Mr. Jarnagin ever know what you got until you gave your deposition in this cause?

A. I didn't know until I got back from the North; I didn't know myself what I would receive.

Q. When did you tell him after your return?

A. I don't know that I told him at all.

Q. Isn't it a fact that the first information he had was from your deposition before the referee?

A. I think perhaps all the facts were not known to him until I made that deposition.

Q. How long have you known Mr. Jarnagin, Mr. Merriam?

117 A. I have known him 23 years.

Q. He has been your intimate friend?

A. Yes.

Q. He has been your partner in that property?

A. Yes, sir.

Q. And you two together had co-operated in all ways possible to bring about a sale of this property before this time?

A. Yes, sir.

Q. And in this trade, under an option which was given in November last, and under which you were to get one-half the purchase price, and Mr. Jarnagin the other half, and the sale was made, and your interest was made to realize $20,000.00 more than Mr. Jarnagin's interest was made to realize, and practically the total of the amount realized for your interest, after paying the debt to Mr. Wright for his interest in the property, and the debt due the Chattanooga Savings Bank, was consumed by your brother in the manner you have already described? Is not that so?

A. Yes, sir.

Q. Mr. Merriam, I hand you herewith what purports to be a copy of your testimony given before the referee in your examination as the bankrupt in this cause. State whether or not it is a correct statement of the testimony given by you on that occasion under oath, and if so, file the same as Exhibit to this your deposition?

A. I will file it as exhibit to my deposition.

Cross-examination.

By Mr. SPURLOCK:

Q. Mr. Merriam, what time did you come to Chattanooga to live?

A. September, 1879.

Q. You went into business here soon afterwards?

A. I went into the wholesale grocery business.

Q. And continued in that business with different partners up to the time you went into bankruptcy, and closed out as Merriam & Son?

A. Yes, sir.

Q. I will ask if it is not a fact that you acquired very large property, and very extensive credit in that business?

118 A. Yes, sir; I acquired considerable property, and good credit.

Q. And is it not a fact that from the time you went into business here, and up to about the time you went into bankruptcy that your credit was very good?

A. Yes, sir; my credit was good; it was not questioned until within the last two or three years.

Q. You bought a good deal of real estate in 1897, 1899, along there, didn't you?

A. Yes, sir.

Q. When did you buy the property sold to your brother?

A. About thirteen years ago; I don't remember just the year; I have owned it 13 years in February.

Q. What was the price paid for it?

A. In the neighborhood of $20,000.00. That was what we first paid for it.

Q. Had your brother made any loans to you prior to the time you bought out Story in your business?

A. Nothing to amount to anything. I owed him perhaps $3,500; I don't recollect what it was, but it was in the neighborhood of that.

Q. And at the time of the execution of this mortgage, September 24th, 1897, you borrowed from him and secured his endorsement to an amount equaling at that time about $35,000?

A. Yes, sir.

Q. And that note was executed to cover whatever you owed him, or might owe him, in the way of borrowed money?

A. Yes, sir; and endorsements.

Q. Was your brother here in 1897 at the time the deed of trust was executed?

A. No, sir; he was not here.

Q. He was not here until about four years ago?

A. I think, about four years ago.

Q. Somewhere about 1899?

A. I think about that time.

Q. When did you first give an option to sell this property, and to whom was it given?

A. Well, it was given to Colonel Kaufman. Mr. Jarnagin and myself gave such an option, that was, an option was made from Jarnagin to me, and I gave Kaufman an option.

Q. When was that?

119 A. About three years ago.

Q. Was that the first effort you made to sell the property?

A. No, sir; I had tried to sell it before. I had an option sometime before that.

Q. When was it you were negotiating a sale to other parties?

A. That was, I think, between July and November, at the time I gave Mr. Brown an option.

Q. Of the same year, you mean?

A. Yes, sir; July, last year, I think.

Q. So that, at least ever since that deed of trust was given, you have been making active efforts to sell that mountain land?

A. Yes, sir.

Q. Was your brother cognizant of these efforts?

A. He knew I was trying to sell the land.

Q. But he never took an option or interested himself personally, until November, 1902?

A. No, sir; he did not.

Q. I understand you to state that in 1899, or about four years ago, when your brother was here, you told him that you owed about $85,000.

A. Yes, from $85,000 to $100,000.

Q. I will ask you whether or not that was just a general statement to him of all your indebtedness, including his and all others, of every kind that you owed?

A. Yes, sir.

Q. Now, at that time, what did you consider the value of all your real estate holdings, including that that was mortgaged, and all this property that was sold?

A. I considered my real estate worth then, I think, about $150,000.

Q. What did you consider the value of your interest in the stock, including the stock, accounts and everything of solvent character?

A. About $35,000.

Q. Now, from that time up to the time of this sale to your brother, I understand from your original examination that a number of representations were made to your different creditors that you were solvent, and had a large amount of property over and above your indebtedness. I will ask you if your brother didn't understand the same thing?

A. I never heard him say any thing about that, but I expect he did.

120 Q. You never made any representations to him that you were not solvent?

A. No, sir; not at that time.

Q. Now, at the time you went to New York to settle up with your brother, you were asked about some misunderstandings between you and him, and some complaints on your part. I will ask you if that was not on account of the price to be paid, instead of the payment itself?

A. It was on account of the price.

Q. You had understood before you went there that you were to get $75,000 out of the property?

A. Yes, sir.

Q. And you complained when you got there because you were getting $65,000 for this stock, instead of $75,000, as you had understood?

A. Yes, sir.

Q. And that was what the complaints you made were about?

A. Yes, sir; those were the principal complaints I made.

Q. I will ask you if it was not with reference to these complaints that the conversations were had with you about the advantages you might derive from representing this company here as agent?

A. I don't know whether the question of my representing the company was brought up at that time, or not.

Q. You can't recall, then, in what connection the conversations were had with you about your representing the company here as agent?

A. They had promised me before, that I should be agent for handling the coal here.

Q. Before the sale?

A. Before I went up there?

Q. Before you went up there, and before this dispute and controversy arose?

A. Yes, sir.

Q. When did you first determine to file your petition in bankruptcy?

A. On the 6th of June, on Saturday.

Q. Was that after you had returned home?

A. Yes, sir.

Q. What caused you to take that step, Mr. Merriam?

A. The parties from whom I purchased goods had stated that they were perfectly willing to carry me for what I owed them, but some of the others commenced to advertise my property—the

121 Penn. Mutual. Friday night when I went home, on the 5th, my wife came to me and said, 'they want you at the telephone.' I went to the telephone, and Mr. Swaney called me up, (of Cook, Swaney & Cook,) and Mr. Swaney stated: 'I have given your property to the Times to advertise for sale—the store property,' and I said, 'that is very strange, Mr. Swaney; the most what I owe them is not due, and they have promised me all the time that they did not want their money. I have kept up the interest, and I have always paid the interest.' He said, 'I will hold up until I can see you in the morning,' and in the morning I went down there and he told me that they had instructed him to advertise the property and offered it for sale, and wanted to know if they had notified me. I said no. I had not heard anything about it. He said he could hold it up two or three days. That was on Friday. I said I wished he would hold it up till next week, and I thought I would be able to fix it all right. $500 was due, and that was all that was due. On Saturday Mr. Tatum came there, and they had stated to me all the time that if I paid the Charley Vann note and the thousand-dollar note, it would be satisfactory. Mr. Tatum had been one of the parties who had given me trouble—really, about the only party that had. I paid Mr. Tatum $1,200 at different times; Mrs. Vann did not want the money at all; Tatum would get the account into his hands, and want the money. I had given a deed of trust at different times, the first on the Ayres property, and then what was owing Mrs. Vann, and he said I would have to give him some

more security. He made this statement on Saturday morning. I said, 'you have security enough; the property is worth double the amount, it can be sold for that, if properly looked after. I gave him a check for her for $250 on that Charles Vann note. I told him to come back there the next week, and I would try to see what I could do. I got to thinking about it, and decided that I had better make some arrangement, and close up my business, so that day I went to see Mr. Chambliss.

Q. What was the amount of the debt to the Penn. Mutual Company?

A. $13,800.

Q. What was the amount of the Vann debts?

A. $6,100, or about that; a little over $6,000.

Q. And that was the first time you thought of taking the benefit of bankruptcy?

122 A. Yes, the first time I had contemplated taking the bankruptcy law.

Q. And it was on account of the action of these two creditors?

A. Yes, sir.

Q. What did you consider the value of the estate mortgaged to secure the insurance debt, that is, your store property?

A. The property was appraised when I borrowed $15,000.00 a number of years ago. It was appraised by Mr. Gahagan, Mr. Warner and Mr. Smartt at $30,000.00. That was when I built the store, and the property was of good value. I had offered the property for $20,000.00 a short time before that.

Q. What was the value of the property that secured the Vann debt?

A. I should think the property ought to be worth $12,000.00. It was 27 lots on Montgomery Avenue, one piece 50 x 150, three lots on Montgomery which never overflowed in front of the Wilhoite property, close to where they are building the stores now, and 9 lots across the river here.

Q. When you paid the $250.00 to Mr. Tatum, did he say anything about foreclosing the lien on this property?

A. He simply said I would have to give more security. I said that I could not, that I had nothing to give security on.

Q. Did he say what he would do if you did not?

A. He said it would have to be fixed up—either have to be paid, or fixed up. I told him to wait until next Wednesday, and I would see what I could do.

Q. Was Mr. Jarnagin, the owner of the other half interested in this real estate familiar with it?

A. Familiar with the property? Yes, sir; I think so.

Q. Had he been over the property?

A. Most of it, yes, sir.

Q. And he had been actively interested with you in the efforts to sell it?

A. No, sir; I had taken charge of the sale of the property principally.

Q. He was willing to take for his half interest $45,000.00 in cash, and $20,000.00 in stock?

A. He consented to do so, when they asked it of him.

Q. What was that considered in cash?

A. The $20,000.00 of stock?

123 Q. Yes.

A. Twenty-five cents on the dollar—$50,000.00.

Q. Now, when you went to New York to settle with your brother, was it then for the first time you learned that you would be paid $65,000.00 in cash and $20,000.00 in stock, instead of $75,000.00 in cash?

A. That was the first time, as I stated. A few days before the land was sold, when I was called up to Rockwood, Mr. Robinson said, "You are to receive your $75,000.00." Just before they left brother called me to him and said, "We may have to ask you to take $65,000.00 in cash and $20,000.00 in stock," and I said, "I don't see how I can do it." That was all that was said about the price before this time you mentioned.

Q. And then when you got to New York, he insisted that this was the price he was to pay?

A. They wrote a letter in reference to the price, and I telegraphed them that Mr. Jarnagin would accept the $45,000.00 cash and $20,000.00 in stock, but that I must have what they agreed to pay me that morning at Rockwood—$75,000.00.

Q. But when you got to New York he refused to pay you more than $65,000.00 cash and $20,000.00 in stock?

A. That was the Saturday when I declined to take the $750.00 to pay the Chattanooga National Bank. I made the statement that I supposed the telegram made it clear. They telegraphed for me to come on, that I was to receive the $75,000.00. I stated that I was not in any condition to take any less; that in order to go on and settle up matters satisfactorily, I would have to have $75,000.00.

Q. If you had had $75,000.00 that would have been all you needed?

A. I thought I could do as I stated by his giving me credit for $10,000.00.

Q. Who was present during that conversation?

A. It was at his home; his wife was about the room; don't think anybody heard the conversation; don't think she did.

Q. Was that the only time you had any conversation with him?

A. Up to that date.

Q. Did you have any conversation afterwards?

A. He talked with me after I went back to my sister's to stay over night; he came that Sunday evening, he and his wife.

124 Q. And did you have any talk then about it?

A. He came up to see me Saturday night, and wanted to know if I would not take $65,000.00, or what I would take. I said that if I had to take $65,000.00, I must have stock that I could use at twenty-five cents. I must have $75,000.00 or its equivalent. He had written me before that if I had to take some stock, he thought he could use my stock there.

Q. And what you were insisting on was, getting $75,000.00 out of the sale?

A. Yes, sir, that was what I wanted out of the sale.

Q. Now, when was it that your brother notified you that his health was failing?

A. He had written me before he came down here in November that after going through a severe operation, his health was getting in such condition, that he felt he would have to get his matters in shape, because he didn't think he would be able to stand the strain of so much business, and wanted to have me close out the land. He urged me to push the Philadelphia parties, and asked Mr. Robinson to investigate them. The Philadelphia people thought they could sell the land after a while. The option to them was out about the first of November; and he then came on here.

Q. And even before he took up the question of this sale, at all, he had notified you that on account of the condition of his health, he wanted to close his matters up?

A. Yes, sir.

Q. And he afterwards took this option, and undertook to make the sale, in order to get the indebtedness settled?

A. Yes, sir.

Q. I will ask you, as a matter of fact, that after the price that he was to pay you was agreed on, if he didn't surrender you the $35,000.00 secured by a mortgage executed 24th September, 1897?

A. He turned over the note to me when we made the settlement on Monday, and I turned him over the deed when the transfer was made.

Q. And that $35,000.00 note is the note that was described in that mortgage?

A. Yes, sir.

Q. That was the note that was filed as one of the exhibits to your deposition?

A. Yes, sir.

Q. And at the same time he turned over to you also the
125 other notes that he had representing indebtedness from you?

A. The notes that he had then I paid, with the exception of two notes, I think, at the Merchant's National Bank which were not quite due; one of them that was due, in fact, he took it before it was due, and sent it on here. He afterwards gave me all the paper he had up there, excepting, I think, two notes.

Q. The calculation of interest and the payment of the total amount was made there on that day, and at that time?

A. He made it that day; he made a statement, during the day, when we made the settlement; after dinner that statement was produced.

Q. Then the balance that was due you out of the $65,000.00 purchase price, was paid over to you was it not, after deducting this amount, and in addition to that, he advanced you some cash on the $20,000.00 of stock?

A. He took the note and he endorsed it for $3300.00, to make up, with the note of $750.00 and $1,000.00 to Mr. Cates, and one of $5,000.00, in all $10,000.00, for which I gave him $20,000.00 stock as security.

Q. So then, in the way of cash and credit, you did get from him $75,000.00?

A. Yes, sir.

Q. I will ask you to state, Mr. Merriam, if you did not tell your brother at that time, or give him to understand, that if you received that amount you would be able to settle with all your creditors?

A. No, I did not tell him that I would be able to settle with all my creditors. I told him I might be able to fix up all my matters so I could close up my business by selling some of the property.

Q. Didn't you tell him that if that amount was paid to you, it would enable you to take care of all your creditors?

A. I told him I could get along.

Q. Was nothing said in that conversation by either of you about any bankruptcy proceedings?

A. No, sir.

Q. And there was no claim made by you or representation made by you to him that you were insolvent?

A. No, sir.

Q. And I understand you to say that there was no thought on your part of actually filing a petition in bankruptcy until you
126 came back and these creditors threatened to foreclose these two mortgages you have mentioned?

A. Saturday, after I got back, was the first time I determined or had contemplated doing that.

Q. I'll ask you to state whether or not Mr. Merriam, you had always considered yourself as solvent?

A. If I sold the other property I had.

Q. Counting the other property, you did consider yourself solvent?

A. Yes, sir.

Q. And when you made these various representations to creditors that you were solvent, as referred to in your original examination, you believed that you were solvent?

A. Yes, sir.

Q. You knew when a debt of $21,000.00 in favor of F. F. Weihl's estate was incurred?

A. I don't recollect the date—I think it was about six years ago.

Q. How did it originate?

A. I demanded of Mr. Wilhoite security for some money he owed me, and he told me he had three lots on Montgomery Avenue which he would give me a deed for. It was at the time he was having so much trouble and excitement here in reference to his indebtedness. People had believed up to that time that he was worth money, and I had so believed myself. He made out deeds for the three lots on Montgomery Avenue, and brought them to me, and as property had not declined then the way it did afterwards, the property was considered very fair property. In examining the deeds, I found there were some encumberances. Mr. Weihl had this against these lots. Mr. Weihl came to me and said, 'Now, I believe that is good property, and that by holding the property, you will be able to get something towards paying what Mr. Wilhoite owes you, and be able to pay me what is due me.' So he released the lots, and took that note

for the amount at 6 per cent. interest, and I had the note renewed from time to time until he died.

Q. In other words, you assumed the debt of Wilhoite?

A. Yes, sir.

Q. What Wilhoite.

A. W. L. Wilhoite.

Q. This debt to the Brown Banking Company, you say that was incurred in 1896?

A. Yes, sir.

127 Q. And the debt to Storey was incurred also in 1896, when you purchased his interest in the partnership?

A. Yes, sir.

Q. Among the other items in your list of unsecured debts are accounts against the firm of Merriam & Son, for losses, and things of that kind?

A. Yes, sir, against Merriam & Son.

Q. I will ask you to examine an exhibit here filed to your former deposition, and state if that is correct—headed: "I. B. Merriam's obligations, February 6th 1896?"

A. I don't recollect filing this paper.

Q. Is that a correct statement of your indebtedness at that time?

A. To these parties at that time, yes.

Q. According to that statement, your indebtedness was then as follows: Vann estate, $7,600.00; Russ Cates, $3,650.00; Fred Weihl, $2100.00; mortgage on Chestnut Street property, $15,000.00; K. T. Jones, $2100.00; T. C. Montague, $1338.00; Mrs. L. D. Eakin $1,000.00; Third National Bank, $1,000.00; Bank of Chattanooga, on the Security on the Wilhoite note, $3080.00; Mr. Squire, $2,000.00; Mr. Reeves, $2100.00; Citizens Bank & Trust Company, $300.00. Is that correct?

A. It was at that time.

Q. And the changes in these debts as shown by the schedule filed are on account of payments that you have since made?

A. Yes, sir.

Q. This statement includes your personal indebtedness, and in addition to that, you had the store indebtedness?

A. Yes, sir.

Re-examination:

Q. You have stated that the debt of $5,000.00 scheduled as a liability by note to the Brown Banking Company, of *of* Wilcox, Pa., was created in 1896?

A. Yes, sir.

Q. Was it to re-pay borrowed money that you borrowed from that bank?

A. Yes, sir, Mr. Brown was a brother-in-law of mine.

Q. For what purpose was that money borrowed?

A. To pay to Mr. Storey.

128 Q. So that was the $5,000.00 you spoke of in your direct examination as the $5,000.00 you paid Mr. Storey in cash when you bought him out?

A. It might have been used directly for that.

Q. You used this $5,000.00 to pay Mr. Storey when you bought him out?

A. This money was deposited to the credit of Merriam & Son, and I paid him $5,000.00 when I bought him out. It was in the bank.

Q. Who borrowed the money?

A. I borrowed the money.

Q. And you borrowed it for that purpose, did you not?

A. I borrowed it for the purpose of closing up with Mr. Storey.

Q. And it has not been paid?

A. No, sir. I paid them about $2,000.00, but it was $5,000.00 originally, and it is about $5,000.00 with interest on it.

Q. You mean to say that since you made this note, you have paid something on account of it, and that the balance due on the principal with interest as accumulated now amounts to about $5,000.00?

A. Yes, sir.

Q. In your cross-examination, you spoke of an exhibit that shows certain of your indebtedness in 1896; does that exhibit show all of your indebtedness at that time, or was it merely a partial list of what you owed?

A. It was a partial list.

Q. You also stated in your cross-examination that four years ago you regarded the value of your real estate to be $150,000.00. Was the real estate to which you referred the Cumberland County mining property sold your brother in June last?

A. Yes, sir.

Q. And the real estate described in the schedule attached to your petition in bankruptcy in this cause?

A. It was.

Q. You had practically the same real estate four years ago that you had the first of May of this year?

A. Yes, sir.

Q. How far from the railroad was the so-called property in Cumberland county at that time?

A. Rockwood was the nearest point to which the railroad was completed. They were at that time building the Tennessee Central.

Q. The Tennessee Central, however, had not been built?

A. Not finished up.

129 Q. They were beginning to work on the Tennessee Central?

A. They had considerable work done on it four years ago.

Q. How far is Rockwood county from your Cumberland county coal property?

A. About ten miles.

Q. So ten miles was the nearest point to which any railroad came to your mining property at that time?

A. I think so, I don't think the Tennessee Central was finished. They finished up that ten miles some time before they did the balance of the road.

Q. Since four years ago, the Tennessee Central has been built near or adjacent to your Cumberland county property?

A. Runs alongside of it for the whole length, nearly.

Q. Was that coal property, four years ago, more valuable than it is today?

A. We considered it just as valuable as today. We asked the same price of $20.00 an acre.

Q. I asked you whether, in fact, it was more valuable?

A. No, I don't think it was more valuable.

Q. You were asking at that time $20.00 an acre with 10 per cent. commission to the man who sold the property?

A. Yes, sir.

Q. You didn't succeed in selling at that price, did you?

A. No, sir.

Q. Now, your other real estate referred to by you at that time was the same real estate described in your schedule of assets in the petition in this cause?

A. Yes, sir.

Q. Was that real estate more valuable four years ago than today?

A. ——

Q. As a matter of fact, was not that real estate less valuable than it is today?

A. It was not held at any lower price than today.

Q. I am not asking about the price at which it was held; I'm asking you about the market value. Was it more or less valuable four years ago than today?

A. I think it was worth about the same price.

Q. Don't you know, as a matter of fact, that practically all real estate in this city has enhanced in value in the last four years?

A. Some property has gone up.

130 Q. Has not the general real estate market in this community increased in value since four years ago?

A. Some property has, and some has not.

Q. Have not the general business interests of the community vastly improved since four years ago?

A. We had very good business four years ago.

Q. Was not four years ago the beginning of a change in this community, and since that time we have had more prosperous times in Chattanooga?

A. Yes, sir.

Q. Now, you said also, that you regarded the value of your stock of goods, including your accounts and bills receivable, to be worth, four years ago, about $35,000.00. You stated in your direct examination, did you not, that the average stock carried by you at that time, three or four years ago, did not exceed $7,500, did you not?

A. I don't think I stated that.

Q. Is it not a fact that the real value of the stock carried by you at that time did not exceed from five to six or seventy-five hundred dollars?

A. About four years ago, I think I had nearly a ten thousand dollar stock of goods.

Q. Then, the balance of this $35,000.00 was represented by accounts receivable and bills receivable that you carried on your books?

A. Yes, sir.

Q. And you continued to carry these bills and accounts receivable up to the time of the filing of this petition, and the amount of the accounts turned over to the trustee aggregated about $25,000.00—nominally $25,000.00?

A. I think so.

Q. Now, Mr. Merriam, you also said that up to the time you sold your coal lands, as shown on the list, you thought and believed you were solvent?

A. Yes, sir.

Q. Didn't you know, as a matter of fact, that the real value of your assets was largely less than the total amount of your liabilities?

A. I didn't four years ago.

Q. I'm not asking you about four years ago; I'm asking you about April and May of this present year preceding the filing of this petition?

A. I know now that at the prices appraised the assets would not pay the liabilities.

Q. You know it falls short?

131 A. Yes.

Q. Don't you know, as a matter of fact, that only two pieces of the property conveyed under your petition in bankruptcy have been sold, and the remainder of the property is still in the hands of the trustee?

A. I think the Vann property was sold; I don't know how much of the other has been sold.

Q. Speaking of the Vann property, don't you know, as a matter of fact, that at the meeting of the creditors held in this cause after that property in question had been appraised and had been examined by those at interest, that your creditors declined to undertake the trouble and expense of foreclosing the Vann mortgage, and directed the representative of the Vann estate to pursue the matter outside of court, because they regarded the value of the property as less than the amount of the debt it secured?

A. I did not know that; I have had no communication on the subject.

Q. But you did know, four months prior to your bankruptcy, that your assets were less than your debts?

A. No, I didn't know it before.

Q. You knew now that the reasonable value of your assets was less than the amount of your debts?

A. The property as valued and appraised was less than my debts.

Q. Didn't you state a few moments ago that you had offered your Chestnut street store for $20,000.00, and that you regarded that as a fair and reasonable value of that property?

A. I didn't mean that; I said I had offered to sell it at $20,000.00.

Q. When?

A. Before I failed, a number of times.

Q. And were you unable to find a purchaser at that price?

A. I didn't look around much, but I offered to sell it.

Q. How much did the appraisers value the property at?

A. I think $20,000.00.

Q. At what figure did the First National Bank and the Penn Mutual Life Insurance Company, that held two mortgages on that property agree to take the property?

A. I think they took it at about that valuation.

Q. Now, then, the total appraised value of your real estate made by the appraisers was $43,000.00; deducting from this
132 $43,000.00 the $20,000.00 realized on your Chestnut street property, leaves a balance of $23,000.00. Now do you mean to say that, in your judgment, the real value of the remainder of your real estate which had been appraised at $23,000.00 was $80,000.00 instead of $23,000.00?

A. I have not made any statement that would lead to that.

Q. Did you not say that you believed a reasonable value of your property was much larger than the appraisers' value, and putting your property at what it was really worth, its value would be equal to, or exceed, the liabilities?

A. The question was asked me what I considered the property was worth—the coal lands and all—four years ago, and I stated that I thought it was worth $150,000.00.

Q. What answer do you make to the question? What do you think was the value of that property four months before the filing of your petition in bankruptcy?

A. I would have to figure it.

Q. Was it more or less than your liabilities?

A. It was more.

Q. Don't you think it was less than your liabilities?

A. Just that property?

Q. The value of your real estate and personal property—all the property you owned?

A. I believe, and have believed all the time, that I could handle the property here for more than I owed.

Q. That is not the question what you can do; I asked you the market value of all your property within four months preceding the filing of the petition in this cause?

A. I would have to think over that; I could not give an answer now.

Q. Mr. Merriam, if my information is correct, your schedule and the claims filed by unsecured creditors shows that the total of these unsecured creditors amounts to something between $45,000.00 and $60,000.00?

A. $79,000.00 is everything, I think.

Q. Do you mean to say, then, that if $79,000.00 or $80,000.00 was everything, that a reasonable value of your real estate in Chattanooga within four months previous to the filing of your petition equalled or exceeded your liabilities?

A. I believe it would.

Q. Do you believe so now?

A. Yes, sir.

Q. And that part of your real estate which the appraisers
133 have valued at $25,000.00, you say was reasonably worth in the market from $59,000.00 to $60,000.00?

A. I believe it was worth that if I could have sold it.

Q. And you believe that now?
A. Yes, sir.
Q. You stated in your cross-examination that you did not conclude to file a petition in bankruptcy until you were pressed by the Penn Mutual and Mr. Tatum?
A. Yes, sir.
Q. Were you not delinquent in the payment of your taxes on that property?
A. No, I was going to pay the taxes, but the taxes were not paid just for this year.
Q. Was the insurance on that property paid?
A. Yes, sir; I think it was.
Q. Had your loan matured?
A. $1,000 had matured?
Q. When had it matured?
A. Last January $500.00 was due, and I think $500 has become due since.
Q. Had you not promised Mr. Tatum, in March previous, that as soon as you closed the trade with your brother, which trade had been practically agreed upon, you would notify him and for him to come to Chattanooga, and that you would pay the claim of the Vann estate in full?
A. No, sir.
Q. Didn't you tell him as soon as you closed the trade you would notify him?
A. No, sir.
Q. Did you tell him anything about it?
A. I said I would try to pay that Charlie Vann note, which was for $1,000, and I did pay him $250.
Q. Did you promise to pay that $1,000 when you sold the property?
A. Yes, sir, I expected to pay it.
Q. Did you promise that?
A. I did before I went away, yes, sir.
Q. Did you not write Mr. Tatum on March 31, as follows: After explaining that your brother had agreed to take the property, did you not say this: "As soon as I can get this land sale closed, you will get the money?"
A. I had reference to that note that he always wanted me to pay; he had never asked me to pay the whole amount to Mrs. Vann at any time.
Q. He came to get the money and did not get it?
134 A. He came in after I got back, and I paid him $250, and told him I would try to arrange the rest of it.
Q. And you didn't do it?
A. No, I went into bankruptcy.

EXHIBIT "A."

Money paid Thomas Merriam and the Merchants' National Bank of Syracuse, New York. This money was paid out of proceeds of sale of Cumberland Mountain lands.

THOMAS MERRIAM.

	Principal.	Interest.
Mar. 5th, 1898	750 00	268 73
Feb. 14th, 1899	600 00	216 96
Jan. 5th, 1903	250 00	6 25
Mar. 11th, 1903	250 00	3 38
Apl. 18th, 1903	300 00	2 10
Apl. 3rd, 1903	250 00	2 50
Jan. 20th, 1903	505 03	11 10
Mar. 30th, 1903	250 00	2 50
Feb. 14th, 1903	900 00	16 20
Feb. 23rd, 1898	750 00	270 22
Mar. 1st, 1897	10,000 00	4397 97
Mar. 4th, 1893	1000 00	15 00
Mar. 16th, 1903	1500 00	18 75
Apl. 16th, 1903	1250 00	9 38
	$18555 03	$5341 04

Merchants' National Bank.

Mar. 24th, 1903	$5229 82	$59 28
Apl. 9th. 60 days. Due June 8	1500 00	12 00
Apl. 15th. 60 days. Due June 14	1500 00	11 50
Apl. 20th, 3 months	3425 00	23 97
Apl. 30th. 60 days. Due June 29	1250 00	6 46
May 8, 60 days	1000 00	4 00
May 5, 3 months	520 27	2 25
May 13, 30 days. Due June 12	1000 00	3 00
May 18, 3 months	3921 29	9 15
Total	37901 41	$5472 65
Interest	5472 65	
Grand Total	$43374 06	

135 EXHIBIT "B."

Statement of Disbursement of Proceeds of Sale of Cumberland County Land.

1. Note Mch. 1st, 1897 to Thomas Merriam, June 1, '03	$10000 00
Interest on above note, June 1, '03	4397 97
2. Note Mch. 5th, 1898 to Thomas Merriam June 1, 03	750 00
Interest on above note, June 1, '03	267 88
3. Note Feb. 14th, 1898 to Thomas Merriam June June 1, '03	600 00
Interest on above note, June 1, '03	217 35
4. Note Feb. 23, 1898 to Thomas Merriam June 1, '03	750 00
Interest on above note, June 1, '03	269 88

5. Note Jan. 5, 1903, to Thomas Merriam June 1, '03		250 00
Interest on above note, June 1, '03		6 05
6. Note Jan. 20, 1903 to Thomas Merriam June 1, '03		505 03
Interest on above note, June 1, '03		11 00
7. Draft Feb. 14, 1903 to Thomas Merriam June 1, '03		900 00
Interest on above draft, June 1, '03		16 20
8. Note Mch. 11, 1903 to Thomas Merriam June 1, '03		250 00
Interest on above note, June 1, '03		3 25
9. Note Mch. 30, 1903 to Thomas Merriam June 1, '03		250 00
Interest on above note, June 1, '03		2 50
10. Note Apr. 3, 1903 to Thomas Merriam June 1, '03		250 00
Interest on above note, June 1, '03		2 50
11 Note Apr. 18, 1903 to Thomas Merriam June 1, '03		300 00
Interest on above note, June 1, '03		2 10
12. Note Jan. 27, 1897 to Thomas Merriam June 1, '03		1200 00
This note renewed time to time, Money borrowed.		
Interest on above note, June 1, '03		9 38
13. Note Mch. 4, 1903 to Thomas Merriam June 1, '03		1000 00
Interest on above note, June 1, '03		15 00
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Borrowed Dec. 17th, 1897, Renewed time to time.		
14. Note Mar. 16, 1903 to Thomas Merriam June 1st, '03		1500 00
Interest on above note, June 1, '03		18 50
This note was renewal of two notes $750 each; 1st, $750 borrowed Feb. 18, 1896, 2nd, $750 borrowed. Feb. 26, 1896.		
Total of notes and drafts with interest paid Thos. Merriam by I. B. Merriam		$23744 59
15. Note to Merchants' National Bank, Syracuse, N. Y., endorsed by Thos. Merriam. This was renewal of $2828. I borrowed Mch. 24, 1897 and carried from time to time. Note 3-24-1903		5229 82
Interest to 6-1-03		59 28
16. Note to Merchants' National Bank Syracuse, N. Y., endorsed by Thomas Merriam. This was renewal from time to time of $1250.38 borrowed Mar. 18, 1896.		
Note Apr. 20, 1903		3425 00
Interest to June 1st, 1903		23 97
17. Note to Merchants' National Bank Syracuse N. Y., endorsed by Thomas Merriam. This was renewal from time to time of $2,000.00 borrowed Aug. 16, 1897.		
Note May 18, 1903, $3,921.29		3,930 44
Interest to June 1st, 1903		9 15

18. To the principal of the above three notes has been added from time to time interest discount and exchange on various paper renewed, drafts drawn, drafts discounted at Merchants' National Bank, Syracuse N. Y., etc.

63. Acceptance discounted at Merchants' National Bank, $500.00 borrowed June 22, 1896, $1,000 borrowed Oct. 4th, 1898 ..... 1500 00
Same carried until June 1, 1903, interest 12 00

18. Acceptance discounted at Merchants' National

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Bank, Syracuse N. Y. This money was borrowed on acceptance, Oct. 22, 1898 and carried until paid.
Interest on same, June 1, 1903 ..... 11 50

19. Acceptance discounted at Merchants' National Bank, Syracuse N. Y. This money was borrowed on acceptance Nov. 1st, 1898, and carried until paid June 1, 1903.
Interest on same 4 00

20. Acceptance discounted at Merchants' National Bank, Syracuse N. Y. This was borrowed on acceptances Feb. 11th, 1898, $600.00; Aug. 5th, 1898, $400.00, paid June 1st, 1903.
Interest on same 3 00

21. Acceptance discounted at Merchants National Bank, Syracuse, N. Y. This money was borrowed on acceptance Dec. 28, 1898, and carried until paid June 1st, 1902.
Interest on same 5 46

22. Note to First National Bank, Feb. 19th, 1896, endorsed by Thomas Merriam as security paid, June 4th 1903 ..... 1000 00

23. Note to First National Bank Feb. 3rd, 1903, endorsed by Thomas Merriam as security, paid June 4th, 1903 ..... 500 00

24. Note to First National Bank, Dec. 31, 1902, endorsed by Thomas Merriam as security. Paid June 4th, 1903 ..... 500 00

25. Note to T. G. Montague Sept. 10, 1897, endorsed by Thomas Merriam as security. Paid June 4th, 1903 ..... 1338 90
Interest on above note 132 60

26. Note to Chattanooga National Bank, endorsed by Thomas Merriam. Borrowed from Third National Bank, Oct. 24th, 1900. Renewed from time to time. Paid June 3rd, 1903.

27. Note to Chattanooga National Bank. Endorsed by Thos. Merriam. Borrowed from Third National Bank. Paid June 5th, 1903 ..... 1000 00
Interest on same 5 00

28. To Chattanooga National Bank. Endorsed by
138
Thomas Merriam. Borrowed from Third National Bank, April 21st, 1900. Paid June 5th, 1903 ..... 750 00
29. Note to Chattanooga National Bank. Endorsed by Thomas Merriam. This was originally a loan of $1,000.00 Third National Bank, borrowed in 1896. Paid June 6, 1893..... 505 22
30. Note to K. P. Jones. Endorsed by Thomas Merriam, A. J. Gahagan, J. F. Loomis. This note was dated Sept. 10th, 1897 ..... 2100 00
31. Note to Thomas Merriam dated May 5th, 1903. This was part of $1,000.00 loan from Third National Bank in 1896 ..... 520 27
Interest on same 2 25
Discount on $5,000.00 note at First National Bank 50 00
32. Cumberland Man. Co., Nashville Tenn. June 3rd, 1903 ..... 6 74
33. T. A. Wright purchase price on land in Cumberland County, June 3rd, 1903..... 5300 00
34. Note to First National Bank. Endorsed by T. T. Wilson. Paid June 4th, 1903..... 500 00
35. Note to First National Bank, favor A. J. Aull. Paid June 4th, 1893 ..... 75 00
Interest on paper at First National Bank.... 354 19
36. Mortgage note on Cum. Co., land to Chattanooga Savings Bank. Paid June 4th, 1903..... 2041 75
37. Hoopeston Canning Co. Hoopeston, Ill., June 4th, 1903 ..... 562 00
38. Insurance Note to Glover and Grady, June 4th, 1903 ..... 146 88
39. Thomas N. Merriam. Personal loan, June 6th, 1903 ..... 30 00
40. Mrs. S. O. Vann on note June 6th, 1903..... 250 00
41. Part note to Mrs. Eakin. Endorsed by J. F. Loomis & A. J. Gahagan. Paid June 6th, 1903 500 00
41. Balance on Note of Mrs. Eakins. Paid June 6th, 1903 ..... 200 00
139
42. Note to Bank of Chattanooga. Endorsed by T. T. Wilson. Paid June 6th 1903..... 232 18
43. I. B. Merriam, Jr., to back salary. Paid June 6th, 1903 ..... 40 00
44. Note to First National Bank, personal note..... 155 22
45. Note to Citizens Bank and Trust Co., Paid June 6th 1903 ..... 75 00
45. Note to Citizens' Bank and Trust Company. Endorsed by A. W. Chambliss. Paid June 6th, 1903 ..... 50 00

46.	One-half of joint note of G. H. Jarnigin and I. B. Merriam at First National Bank. Paid June 6th, 1903	200 00
	F. G. Merriam, June 6th, 1903	18 09
47.	Dr. H. Berlin, June 6th, 1903	150 00
48.	Bills receivable. First National Bank, June 6, 1903	105 50
49.	R. M. Hughes & Co. Louisville, Ky	32 20
50.	Meat bill, June 6th, 1903	5 00
50.	Mrs. I. B. Merriam, June 6th, 1903	245 00
51.	Note to First National Bank, June 6th 1903	30 20
50.	Note to Thomas Merriam. Paid June 1st, 1903	522 52
50.	Thomas Merriam, June 6th, 1903. Back salary	50 00
52.	N. Dietzem and Brothers, June 3rd, 1903	8 55
53.	W. J. Poe, June 3rd 1903	5 92
54.	Note to Fritts and Weihl, June 3rd, 1903	66 67
	McGowan & Cooks Co., cash	2 50
55.	Freight C. S. Ry., June 2nd 1903	5 41
56.	Southern Soda Works, Nashville Tenn. June 2nd	68 18
57.	T. T. Wilson, June 2nd, 1903	8 00
58.	Great Western Cereal Company, Chicago, Ill	59 00
59.	N. Dietzen and Bro., June 2nd, 1903	7 07
60.	Freight N. & C., June 3rd, 1903	3 60
61.	H. B. Case for Whittaker & Co., June 5th, 1903	15 19
62.	R. D. Cheyney, June 6th 1903	5 35
		$73,490 96

140 In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

In the Matter of I. B. MERRIAM, Bankrupt. No. —.

Examination of I. B. Merriam, the Bankrupt, at the First Meeting of the Creditors.

By Mr. WOODARD:

Q. I will ask you if you owned some lands, or interest in lands until recently, and if so what interest? Did you — the lands absolutely, or did you own them along with Mr. Jarnigan?

A. I owned them along with Mr. Jarnigan.

Q. You had half interest in them?

A. Yes, sir.

Q. Where were those lands?

A. In Cumberland County, Tennessee.

Q. Did you sell your interest in these lands? If so when?

A. About the first of June. I do not recollect the date.

Q. How much did you get for your interest in the land?

A. I got $65,000.00 in money, and $20,000.00 in stock.

Q. Say you sold them for $65,000.00 in money and $20,000.00 in stock in the company?

A. Yes, sir.

Q. What company? Was that or not a company just organized?

A. Yes, sir.

Q. And you took that much stock in the company besides the money you got?

A. Yes, sir.

Q. And that occurred about the first of June, this month?

A. Yes, sir; near there.

Q. What became of the money that you received from the lands?

A. I have a statement of it here. Shall I read it?

Q. Yes, you can read it for the information of your creditors.

A. I owed my brother $23,796.04 individually, besides endorsements which he had made for me.

Q. And you paid him that much?

141 A. Yes, sir.

Q. Then what? Was your brother Tom Merriam of Syracuse?

A. Yes, sir.

Q. What become of the balance of the money?

A. My brother was endorser for me—I have not got all this statement, understand. I did not know that I was going to be examined today.

Q. Give it as near as you can.

A. He was endorser on paper for me in banks in Syracuse and also here in Chattanooga.

Q. Did you pay the balance of the $65,000.00 on these notes that he had endorsed for you?

A. Most of it, except about $5,000.00. I would have to make up a statement of those things.

Q. You mean you paid the balance except about $5,000.00?

A. Yes, sir.

Q. You paid, then, out of this money $23,796.04 that you owed your brother, and also the balance of it except about $5,000.00 on notes of yours on which he was endorser.

A. I think I did. I would have to have a statement to show that.

Q. Then you will make up that statement for the benefit of your creditors hereafter?

A. Yes, sir.

Q. What did you do with the other $5,000.00?

A. I paid it out on various claims. That is the statement which I wish to make.

Q. That is, other debts you owed?

A. Yes, sir.

Q. All prior to the filing of your petition in bankruptcy?

A. Yes, sir; I do not say it was just $5,000.00.

Q. All of this was done prior to the filing of your petition in bankruptcy on the 9th of June?

A. Yes, sir.

Q. Can you make that statement by day after tomorrow?

A. Yes, sir; I think I can. I can not get all of the paper back.

My brother is paying some of the paper up there, and I would have to have the papers here.

Q. Can you make that statement?

A. Yes, sir.

142 Q. What did you do with the $20,000.00 of stock in this new company?

A. My brother has that stock.

Q. All of it?

A. Yes, sir.

Q. I thought your schedule showed he had only $10,000.00 of it?

A. No, sir; the whole thing.

Q. What is that pledged for?

A. My brother gave me a note with his endorsement for $5,000.00, which I used in the First National Bank, due in one year.

Q. When did he give you that?

A. When I was up there and made the transaction. He also discounted a note of $3,300.00 at the bank there in Syracuse and gave me the money, and there was two notes here, one at $1,000.00 to Mr. Cates, which he gave a new note for, and also a note of $700.00 to Mr. Poe, making in all $10,000.00.

Q. So you gave a new note to Gus Cates?

A. The note was given in place of another he had for $1,000.00.

Q. Is that included in this debt here?

A. It is not secured by this mortgage. It is simply a renewal of the old note.

Q. Has that note been given to Mr. Cate as yet?

A. No, sir; I have the note.

Q. So that note has not been given to Mr. Cates?

A. No, sir.

Q. But you do owe Mr. Cates that $1,000.00 in addition to his secured debt?

A. Yes, sir.

Q. You speak of your brother having discounted a note of yours given up at Syracuse for $3,500.00. What did you do with the money that you got from that?

A. I brought that home with me, of which I will give a statement showing where it went.

Q. That was in addition to the $65,000.00?

A. Yes, sir.

Q. This $5,000.00 that you speak of in the bank here; Tom Merriam simply went security on it?

A. Yes, sir; he went on it as security.

Q. Was that a renewal?

A. No, sir; it went towards making up some paper that I had in the First National Bank.

143 Q. Then that was used just like the other money—to pay a bank debt?

A. Yes, sir.

Q. But instead of paying that in money, he, as endorser, went with you and you owe that debt to the bank now?

A. Yes, sir.

Q. And this $20,000.00 of stock to secure that $10,000.00 is evidenced in the way you have detailed?

A. Yes, sir.

Q. Have you any other property outside of what is scheduled here, and what you have stated about?

A. No, sir. I have given everything in except household furniture, which if not in there. I have given in everything that I have.

Q. There is an indebtedness in this list to Mrs. Merriam, your wife?

A. Yes, sir.

Q. What is that debt for?

A. When we were first married, she gave me about $500.00 and I put it in my business, and after we moved here she had some property in this city which was sold, and which made up that amount.

Q. Did she have a note on you for this?

A. No, sir.

Q. Did she have for the $500.00?

A. The whole thing amounted to about $1,350.00, what she gave me when her property was sold.

Q. And the other $500.00 was money you got when you married her?

A. Yes, sir; about that time; probably three or four months after we married. I do not recollect just the time. It was property that she sold after we married.

Q. In paying these notes to various banks, did you pay any notes on which your brother was not liable, or just notes that he was liable on?

A. I paid some paper, yes, sir, that he was not liable on. That I will show in the statement.

Q. As I understand you, you owned this land up here in Cumberland county, or a half interest in it. Was it free and unencumbered?

A. No, sir; there was a mortgage against it for $4,000 down here at the Chattanooga Savings Bank.

Q. A mortgage in favor of the Chattanooga Savings Bank?

A. Yes, sir. I want to state right here that Mr. Jarnigin
144 and myself owed $10,600.00 to Mr. Wright for land which went into this land to make up the amount. I brought that money back when I came from the North and paid for this land.

Q. What Wright?

A. Will Wright. We owed him $6,500.00.

Q. Was that to pay a prior lien?

A. No, sir, just simply a debt. We bought this property. It was the purchase price of land we bought. I will make a statement of this.

Q. This bank mortgage—the bank, then, had a mortgage on the balance of the land exclusive of the Wright claim?

A. Yes, sir.

Q. And you paid that off?

A. Yes, sir.
Q. So as to make the land clear?
A. Yes, sir.
Q. Was there any other mortgage on it?
A. No, sir.

By Mr. GAINES:

Q. This money that you paid out; did you pay any of it direct to your brother?
A. Well, he took it out of the amount that was due me.
Q. He held that amount out of the purchase money?
A. Yes, sir.
Q. You paid him $23,000.00 direct that you owed him?
A. Yes, sir.
Q. And then in addition to that he held out of the purchase money you got for that land this money to pay these various obligations for which he was surety for you?
A. Yes, sir; or turned the money over to me; that is the same thing. I brought the money here to pay those out. That was all kept back, and I brought the money with me to pay those obligations out, which I did.
Q. This deal was under consideration for some time, was it not?
A. Yes, sir; since the 26th of last November, I think.
Q. And you and your brother—of course he was familiar with your situation and knew about how you were fixed financially?
A. Yes, sir.
145 Q. That is, he knew of your financial condition?
A. Yes, sir; something about it.
Q. He knew you were hard pressed?
A. Yes, sir.

By Mr. MCLEAN:

Q. I did not gather what this debt to your brother was for; this $23,000.00?
A. $10,000.00 of it was loaned me about 10 years ago, and then he loaned me at various times, and then the interest made it amount to that.
Q. What was the balance for?
A. Money loaned me at various times since that time.
Q. So you used every cent of money you got out of that sale to pay what you owed your brother and to pay off notes on which he was endorser for you?
A. I paid the debt against the property to Mr. Wright of $10,000.00 and $4,000.00 besides paid on the mortgage.
Q. Your half of the purchase money was only $5,000.00?
A. $5,300.00 was what we owed Mr. Wright and $2,000.00 to the bank.
Q. Did you arrange before you left New York to turn over this entire stock that you got in this new company to your brother?
A. I did so when I left there, when he gave me this statement. I got the money at the National Bank in Syracuse.

Q. And you arranged that before you come down?
A. Yes, sir.
Q. And he knew that would leave you insolvent?
A. No, he did not know anything about that. When I left him I expected to try and go on with my business.
Q. As matter of fact it did leave you insolvent did it not?
A. I did not think so at the time. I thought I would be able to arrange my matters and go on with my business when I left him.
Q. Isn't it matter of fact that you could not have paid dollar for dollar on what you owed?
A. No, not at that time.
Q. This coal land that you sold; the proceeds of which were appropriated by your brother, except these prior liens that you
146 paid off; that is the property you have been holding out to your creditors as the assets from which they were to be paid for the last several years is it not?
A. I had other assets. I did not tell them that alone.
Q. Haven't you held out this special asset for the payment of the debts?
A. I expected to realize for the time being to pay out my immediate wants.
Q. As matter of fact why didn't you bring that money back and divide it among your creditors instead of paying it to your brother?
A. My brother had a mortgage on this land.
Q. Didn't I understand you to say just now that he did not have a mortgage on it?
A. I supposed it was understood that he did have one for 7 years.
Q. Was it of record?
A. No, sir.
Q. It never has been placed of record?
A. No, sir.
Q. In whose hands is that mortgage?
A. In Tom Merriam's, my son, as trustee.
Q. I thought I asked you -while ago to be specific and state what mortgages were on that land?
A. I did not understand you then.
Q. Who has the mortgage now?
A. Tom Merriam, my son.
Q. And what was it for, what was the amount of it?
A. I owed him that amount for his endorsements and this $10,000.00.
Q. Will you produce that mortgage right now?
A. I have not got it here.
Q. And that was turned over to your son to hold?
A. Yes, sir, he was trustee.
Q. And it was never put of record?
A. No, sir.
Q. Why didn't you put it of record?
A. I thought it would injure the sale of the land, and it was well understood here that my brother was on paper here for me in banks, and there was no concealment about it whatever, and I stated that he was backing me.

Q. Was there a mortgage on that land to secure this backing?
A. No, sir.
Q. And no one knew of that but your brother, you and your son?
147 A. My family knew it and Mr. Jarnagin knew it.
Q. Did your brother understand that that deed of trust was not to be placed of record?
A. Yes, sir.
Q. And he agreed to that?
A. Yes, sir.
Q. I understood you to say just now that that mortgage on this coal land included $10,000.00. What $10,000.00?
A. That I borrowed from him about 10 years ago, and then the interest on it.
Q. Was that a blanket mortgage?
A. A regular mortgage.
Q. Was it to cover any sums that he might endorse for you, or what kind was it?
A. It stated $35,000.00.
Q. And did you owe anything like that to him at the time?
A. Yes, sir.
Q. These notes were all paid from time to time since then?
A. Some of the paper that he endorsed was renewals from time to time, though there was one note of $10,000.00 in the First National Bank, and then I attached paper to that and endorsed them and paid the interest on it.
Q. Isn't it a fact that it was not necessary for you to pay all of that money to your brother to clear that land?
A. He took it to sell with that understanding.
Q. By the agreement between you and your brother that was not an encumbrance on it?
A. He knew that he had the mortgage.
Q. Didn't you and your brother agree to not let it be known that there was a mortgage on it?
A. No, sir.
Q. Didn't you represent to your creditors that that property was not encumbered except by a mortgage of $4,500.00?
A. No, sir.
Q. Didn't you promise to pay your creditors generally, and some in particular, as soon as that land sale was made?
A. I expected to get more for the property?

148 By Mr. PRITCHARD:

Q. State how long before your act of bankruptcy it was that the aggregate of your property, exclusive of any property which you may have conveyed, transferred, sold or removed, with the attempt to deceive or delay creditors, was insufficient, at a fair valuation, to pay your debts?
A. I could not answer that question intelligently.
Q. Isn't it a fact that for more than four months next preceding

the filing of your petition you were insolvent within the definition I have just read?

A. I do not know that I was.

Q. Don't you know that for more than four months preceding the filing of your petition you were insolvent?

A. I know it now, but I did not know it then. I did not believe that I was.

Q. And you were insolvent at the time you transferred this property to your brother for pre-existing liabilities?

A. I did not know that I was.

Q. You were in point of fact were you not?

A. It may appear that way now.

Q. And you were so in point of fact at the time you made this preference to your brother in Syracuse?

A. I expect I was.

Q. You were at the time you executed these notes, which you say you still have in your possession?

A. What notes?

Q. You said you had two or three notes.

A. I have got a $700.00 not- and a $1,000.00 note that my brother gave me endorsed, one to go to Mr. Cates, and——

Q. You were insolvent at that time wasn't you?

A. It will appear so now.

Q. State what date you returned to Chattanooga from Syracuse?

A. I do not recollect the date.

Q. Give it as near as you can.

A. It must have been about the first of June.

Q. State what date after your return you began the preparation of your schedule and petition in bankruptcy?

A. On the 8th.

Q. How long had you been at home before you began work on it?

149 A. About a week, I think.

Q. Didn't you begin it in the same week that you returned? And didn't you prepare them during that week and file them on the Monday or Tuesday following?

A. No, sir, I did not commence the preparation of it until Monday morning.

Q. Why did you delay it after accomplishing the sale of the land for several days?

A. I did not expect I would have to make this move.

Q. Didn't you know when you arranged in New York that your brother should receive the entire proceeds of this land that you would do it, and didn't you do it in contemplation of that?

A. No, sir, I did not.

Q. When did you decide to do it?

A. I never decided upon it until Monday. On the Saturday before I saw an attorney about it.

Q. State whether or not you represented to your creditors that the proceeds of the sale of this land would be sufficient to pay your debts, and that it would be so applied?

A. I never represented anything of the kind.

Q. Do you swear that you did not?

A. I expected to get about $10,000.00 more for the property than I received.

Q. And you state on oath that you did not represent to your creditors that the claims held against you would be paid out of the proceeds of sale of this land? Not only once but time and time again?

A. I represented that I would be able to——

Q. State whether or not you distinctly and repeatedly represented, not only that you expected to be able, but that you would with those proceeds pay the claims against you?

A. I do not recollect making any such statement as that. From time to time I told them that I thought I would be able to pay that indebtedness.

Q. At the time of making these representations didn't you intend to appropriate this fund to the payment of the claims held by your brother?

A. As I stated, I intended to get $10,000.00 more for the land than I got, and I calculated that I would be able to pay these claims when I got back, and probably I did make some statements, but they cut me down $10,000.00 on the land.

150 Q. Didn't you state to Mr. W. F. Kalb, the manager of R. G. Dun & Co., that the proceeds of this land would pay your debts?

A. No, sir, for I knew it would not.

Q. How much indebtedness was there from you to your brother at the time of this sale?

A. There was $23,000.00 direct to him, besides his endorsements.

Q. They had been existing for sometime?

A. Yes, sir.

Q. And you were insolvent at the time and knew that your brother would have to pay the debts?

A. I did not consider myself insolvent. I thought with other property that I had that I would be able to pay my debts.

Q. What other property—name it?

A. Different property. I expected to sell them for more than they were mortgaged for.

Q. The negotiations for the sale of this mountain land had been going on for some time had it not?

A. Yes, sir.

Q. You had previously contracted to sell it to some one else, you and Mr. Jarnigan?

A. We had given an option on it previous to this time.

Q. Hadn't you previously contracted to sell it to some one else for $150,000.00?

A. That was before we gave the option to my brother.

Q. That sale you expected to carry through?

A. Yes, sir.

Q. It was made in good faith?

A. They failed to come up to their contract.

Q. Pending that sale, were you notified that your brother had an unregistered mortgage?

A. No, sir; they refused to give us that much for the property.

Q. Was a deed prepared to be delivered to those people?

A. Yes, sir. I do not recollect.

Q. Had a deed been prepared for $150,000.00 and deposited in escrow?

A. I do not recollect.

Q. Was a written contract of sale entered into with these people?

A. Yes, sir.

Q. They were not notified of the mortgage?

A. No, sir.

151 Q. What would have been done if the sale had been made to them?

A. I would have given them a deed straight for the property, and I would have used it in payment of my debts.

Q. You negotiated in person with these Philadelphia people?

A. Yes, sir.

Q. Was your brother present at the negotiations?

A. No, sir.

Q. Didn't he see them and talk with them?

A. No, sir; he did not know anything about it, only what I had written him. I had not seen my brother until he came down here in November after they failed to carry out their contract.

Q. You went to Syracuse in person to close the sale of this land?

A. Yes, sir.

By Mr. CHAMBLISS:

Q. Didn't you state a minute ago in your direct examination that you would get that mortgage and surrender it here to the referee?

A. My son has it.

Q. Didn't you make the statement that you would surrender it?

A. Yes, sir.

Q. In regard to the $1,000.00 note to Mr. Cates, state whether that was an original note or a renewal note?

A. It was a renewal note.

Q. As to the $700.00 note to Mr. Poe, is that in the same condition?

A. Yes, sir.

By Mr. PRITCHARD:

Q. State whether or not you will file, and when you can file, with the referee a complete statement, showing in detail, by items and dates, what disposition you made of the proceeds of the sale of the Cumberland county lands, showing what debts, claims or liabilities you claim to have discharged with such proceeds, and the dates *of* said debts were originally created, and to whom you made the payments, and filing as part of your statement as an exhibit

152 thereto, any notes, accounts or other obligations which you claim to have taken up and discharged with the proceeds of

that sale. Present this in typewritten form and file it with the referee at the earliest practicable moment?

A. I will not be able to get all of the notes.

Adjourned until Monday.

In re I. B. MERRIAM, Bankrupt.

In Bankruptcy.

Examination of I. B. Merriam, Bankrupt, Resumed on Monday.

Examination by Mr. A. W. CHAMBLISS, Attorney for Bankrupt:

Q. Mr. Merriam, have you got the list that you were asked to make here with you?

A. Yes, sir.

Q. Will you please file that list?

A. Yes, sir, I will.

Q. Have you also the mortgage that you were asked to file?

A. Yes, sir.

Q. Will you please file it also?

A. Yes, sir; I will file it.

Q. Have you got the $700 note and the $1,000 note that you were asked to produce and file?

A. I have.

Q. Will you please file them?

A. Yes, sir.

Q. Are these the two notes?

A. Yes, sir.

Q. I will ask you, Mr. Merriam, first as to the $700.00 note; I will ask you what that note represents?

A. That represents the notes that Mr. Poe has for $700—this was to renew it.

Q. Was that intended to renew that note?

A. Yes, sir.

Q. Has that note ever been taken up?

A. No, sir.

Q. This note was intended to be used in payment of that note?

153 A. Yes, sir.

Q. Does your brother own that note?

A. Yes, sir.

Q. The $1,000.00 note, what does that represent?

A. That note was to Gus Cates.

Q. Were both of these notes delivered to you and endorsed by your brother for the purpose of renewing the notes he is now on?

A. Yes, sir; the $700.00 note, I might say, it wasn't endorsed on the back, they preferred to have it endorsed as security, and I sent it to my brother and he endorsed it, and it didn't get back here until after the assignment.

Q. Were you ready to deliver these notes to the parties on the surrender of the notes they now hold?

A. Yes, sir.

Q. Referring to the mortgage which you have filed here, state why and when that mortgage was executed?

A. That mortgage was executed September 24th, 1897.

Q. Why was it executed?

A. It was executed for money that I owed my brother for the endorsements he was on at the time.

Q. Did the amount of endorsements of money that you owed him aggregate $35000, at that time?

A. Yes, sir.

Q. Did you execute to your brother the $35000, note referred to in the mortgage?

A. Yes, sir.

Q. What became of that note?

A. I have got that note.

Q. Was it taken up in this settlement with your brother?

A. Yes, sir.

Q. Was that note delivered to him at that time?

A. Yes, sir.

Q. Has that remained in his possession?

A. Yes, sir.

Cross-examination of witness by J. HODGE MCLEAN:

Q. I believe you say you have the report there for that payment?

A. Yes, sir.

Q. Mr. Merriam, you have filed a report here showing payments to the extent of $73,300, and the first item I notice is a note to the Merchants' National Bank of Syracuse, N. Y., for $1,500, when was that note paid?

154 A. I do not know just the date, but it was paid when I was up there.

Q. When was that?

A. I was up there about the 1st of June, or the last days of May.

Q. Of this year?

A. Yes, sir.

Q. When was that money borrowed?

A. That money was borrowed on a note, and the note was renewed every 60 and 90 days.

Q. About when was it?

A. It must have been over sixty days ago.

Q. What was done with the money?

A. I used it in my business here.

Q. In your store here?

A. Yes, sir.

Q. In what way did you use it?

A. Buying and paying for merchandise and carrying on the business and paying some debts, that had been renewed.

Q. I asked you when did you first get this money?

A. I said I could not tell that; I don't know that, as I have no records here.

Q. Well, about when?

A. I can tell by my ledger, that's the only way I can tell, for I don't know.

Q. Was it a year ago?

A. I don't know I said; I can tell by my ledger; I would have to have Frank Merriam here, as he kept the books.

Q. Have you the notes that you paid?

A. I have a part of them; I have those paid before I left there.

Mr. McLean: I move the further examination of the bankrupt ze continued until —

By Mr. Lancaster:

Q. Mr. Merriam in this list that you have filed this morning of payments made out of the funds coming from the sale of the coal lands, you have here four drafts, which you schedule as drawn on Thomas Merriam through the First National Bank during the months of April and March last for over $10,000, what do you mean by saying those drafts were paid during June?

155 A. He paid the drafts.

Q. You mean then by those items that Thomas Merriam had paid drafts during those months that you had drawn on him for this amount, and you reimbursed him out of the funds coming from this land?

A. Yes, sir.

Q. Now you have also in that statement a number of notes in favor of Thomas Merriam, exclusive of this $10,000 note, what was the age of those notes; I mean how far back had they gone?

A. The statement shows that.

Q. Now this statement shows they were made in 1898, were they originally made then, or were they renewals then?

A. They were originals made then.

Q. What was the consideration for those notes?

A. The money he let me have.

Q. Borrowed money?

A. Yes, sir.

Q. Now you have a draft drawn on Thomas Merriam for $900.00, when was that draft drawn?

A. I do not know when it was.

Q. Was it in the last few months?

A. It was really a check paid; he paid that instead of sending it back to the bank for payment here; he paid the $900.00 check; the records of the bank will show that.

Q. Was it within the last few months?

A. Yes, sir.

Q. You have a note here of $10,000, to Thomas Merriam, when was that note made? no date?

A. That was the $10,000 note we mentioned the date ought to have been put on that; I have it at home.

Q. Can you give me approximately when that note was made?

A. That note was made before the mortgage was made.

Q. Before this mortgage in September, 1897?

A. Yes, sir.
Q. Now what was that note made for?
A. For money that I got of him at different times.
Q. Was this note then exclusive of that $35,000?
A. That was just intended to cover that note as security.
Q. Now this statement shows all of the money that you owed your brother at the time that this coal land deal was made, does it?

156 A. Yes, sir, everything is in that statement.

Q. Now you have an item here of $5,241.04, which is described as interest on above notes and drafts?

A. Everything he had up to the time I settled with him; he commenced back and figured up 6 per cent. interest on the $10,000 note, and all of them.

Q. Have you a copy of the calculations showing that you owed him that $5,000?

A. I think so, yes, sir, on the statement turned over the other day.

Q. Will you please file that as an exhibit to this your deposition?

A. It has been filed.

Q. Now what was the total amount of your indebtedness June prior to the time you made this sale of the coal lands, including everything?

A. Last June, you mean?

Q. I mean this June, just prior to the time you made the sale of the coal lands?

A. I could not tell you.

Q. Now when did the firm of I. B. Merriam and Son dissolve?

A. Thursday of June, 1903?

Q. When did the firm of Merriam & Story dissolve?

A. I can not recollect the exact date.

Q. How many years ago was it?

A. About February 6th, 1896.

Q. And from that time on until June, 1903, the firm was Merriam & Son?

A. Yes, sir.

Q. Did your property holdings materially increase or decrease during that time?

A. It has decreased since that time.

Q. This deed of trust that you gave your brother in September, 1897, purporting to be given to secure a note of $35,000——

A. Yes, sir, with the other indebtedness.

Q. Where is that note?

A. I have got that note at home.

Q. Will you please file that also?

A. Yes, sir.

Q. What did that note represent?

A. That note represented the $10,000, note there, and then I think it represented no indebtedness besides the securities that my brother was on.

157 Q. Well, did that $10,000 represent money that you had actually borrowed from your brother at that time?

A. The $35,000, was for borrowed money or securities he was on.

Q. Then it was a collateral note?
A. Yes, sir.
Q. At the time that you gave him that collateral note, was the total amount that you had borrowed from him, and the amount he was endorser for on your account, did that amount aggregate $35,000, the amount of that note?
A. Yes, sir.
Q. Was that note ever renewed?
A. That $35,000 note?
Q. Yes, sir.
A. No, sir; it was a collateral note.
Q. It never was renewed you say?
A. No, sir.
Q. From the time that that note was given on until the time of your bankruptcy, you had a pretty hard time to keep up with your obligations, to meet your obligations and pay interest on our indebtedness, did you not?
A. Of course, I had to work along.
Q. And during that time your stock of goods as a wholesale grocer gradually dwindled down?
A. It dwindled down in the last three or four months.
Q. During the last year you have had a very much smaller stock in your store, have you not?
A. I have been running it down.
Q. You have been in an earnest effort to sell your coal land to meet your indebtedness?
A. Yes, sir.
Q. Who did you sell that coal land to?
A. Thomas Merriam.
Q. When did you make that sale?
A. I think it was on June 1st.
Q. How long had that trade been pending?
A. Since last November.
Q. Was he trying to sell that property for you as an agent on a commission before he bought it himself?
A. No, sir; he didn't work on any commission at all.
Q. You were negotiating with him to sell direct to him?
A. Yes, sir; and his parties.
Q. When did you go to Syracuse, N. Y., for the purpose of closing that trade?
158 A. I left there on Tuesday I think before the 1st of June.
Q. When you left here the terms of your trade had been agreed upon, hadn't it; the terms of the sale?
A. That was my understanding.
Q. How were those terms express-, in letters?
A. The last was in a telegram.
Q. Had any letters passed between you prior to that time showing what the terms would be?
A. We had a contract about what the terms would be; he had changed his part of the contract, but I had not changed mine.
Q. Where is that contract?

A. We have a copy, I think.

Q. Will you please file that with your deposition?

A. Yes, sir.

Q. Now when you received that telegram what did the telegram say?

A. I don't think we received a telegram from them; we received a letter I think from Roberson in reference to it; we sent them a telegram that's the way of it.

Q. I thought you stated they sent you a telegram?

A. No, we sent the telegram.

Q. What was in that telegram?

A. It was that Mr. Jarnagin had accepted the proposition made me in the morning when I was at Rockwood a week ago.

Q. So there was a separate proposition made to you, and different from that made to Mr. Jarnagin?

A. Yes, sir.

Q. What was the proposition made to you?

A. At Rockwood?

Q. Yes, sir.

A. I didn't suppose there was going to be any change at all; my brother, Mr. Miller and Mr. Roberson had all been upon the land a number of times, and I was up there with them, and everything appeared to be satisfactory; they stayed up there after I come away; an engineer of the Tennessee Central Railroad was on the land to see about building a railroad from Ozone up to the land; the Tennessee Central sent their surveyor there, and they were there a number of days after I left; they were to give Mr. Miller and his associates the price of what they thought it would cost to build the railroad from Ozone to a point called ——; they
159 came on Friday, Mr. Miller, Mr. Roberson and my brother to Chattanooga, and I saw them at the Read House, and he said nothing but what it would be satisfactory, and of course I was to get the price I supposed on my land, and on a Monday morning Roberson said we will go back on the land and look over the timber on the Western Grant, and we will go over to Nashville from here to see about what the railroad is going to cost; and I got a telegram I think either Tuesday or Wednesday saying for me to be at Rockwood the next morning; while they were gone I got a letter from Miller to my brother in a large envelope, and I sent that letter to Ozone, and as soon as they got that letter they telegraphed to me that Mr. Miller in that letter saying he was willing after I got to Rockwood to show me that letter, and they showed me the letter and I read the letter over, and the letter said, he didn't then take into consideration what the Tennessee Central was doing, and the advantages they had for shipping coal, and so on, and that he could not afford to go into the deal; and when I got through reading that letter they said there would have to be a reduction made on the price of the land, and that they believed they could get Mr. Miller in the proposition; that they would go to New York and visit him and let Jarnagin and myself know by telegram, and my brother said he would not change the price that I was to receive for the land; he said,

you will get the same price for the land, but I will lose it, and he said Jarnagin, I will have to ask him to take less for his interest in the land, and so he went on to New York, and the next Monday we got a telegram, stating that they had got Miller in the proposition again, and that they would write; Mr. Roberson wrote a letter, stating in that letter that they would give $90,000 cash and $20,000 each of the stock; my brother wrote a letter at the same time, stating that he would give me $65,000 cash and $20,000 in stock. He said he could not get Miller in the proposition without making some reduction. Mr. Jarnagin had agreed to take $45,000 cash and $20,000 in stock, and I answered in the telegram I accepted the proposition as far as Mr. Jarnagin will accept the proposition; that is as near as I can recollect the telegram, but I will have to have what you agreed to pay me on Wednesday morning. I said something of that kind in the telegram; when I went North I expected to get
that $75,000 cash; I expected instead of paying off my
160 brother the money I owed him, I would allow him to credit
the $10,000.

Q. Now when you went to New York and the trade was closed, please state all that passed between you and your brother in reference to the disposition of the funds?

A. I could not give it all.

Q. Well state what you can?

A. I can't recollect at all.

Q. Well state what demands he made on you?

A. They had a meeting on Saturday, but I didn't attend the stockholders' meeting; they were going to force me to take stock and didn't notify me about the meeting at all; and they stated that they had elected me President or Vice-president, I don't remember just which, and Miller, General Manager and a Mr. Sisson, another large stockholder, was to come here and take charge of the business of the company.

Q. Did they actually pay you $60,000., in cash?

A. I want to make a statement ahead of that; Saturday night I was at my sister's; I went over Saturday evening; I thought I would come on home if my brother was ready to settle with me, and I expected to get $75,000., cash. Well there was a note due here on the next Monday at the Chattanooga National Bank of $750.00, and I told my brother about it, and he said you had better let me pay you or give you a check and send down there and take up the note, and I told him that it would go to protest on Monday if it wasn't paid, and I told him all right, but that I would need a little more money to send on, and he said I can't give you any more money, and I said, well I will not take anything, and he said, why, I can't pay the $65,000, and I said I was to have $75,000, well he said he had done everything in the world to get the trade through, and he had to get it through on that plan, and I told him that I was short of funds to come back here and meet my obligations; I went out to my sister's and on Monday morning I went back to see my brother, and in the meantime he was out to see me at my sister's, but he didn't say very much about it; I told Mr. G—— I

had agreed to take $75,000, and he said my brother had to get the thing through the best he could, and that he would help me later after they got things all settled up, and that I could come back home and do the best I could to carry myself along until they got to operating the coal mine, and that they would make me general agent for selling the coal; and to arrange my business here
161 the best I could, and they would give me a position to handle their coal, and that I could make far more money in that, and that they would run the mine at 10,000 tons per day, and that they would give me the general agent for selling the coal, which would be a very profitable business; I had a talk with my brother and saw I could not do any different, so I accepted the $65,000, and he gave me this $10,000, I told you about, and he said, go back and straighten your matters out the best you can; he said Mr. Miller thinks a good deal of you, and we will try to arrange the whole matter; that's the way I left my brother.

Q. Now your purchase price then was $65,000, and $20,000, in stock?

A. Yes, sir.

Q. $20,000, in stock, and that stock you put up as collateral and borrowed $8,333, in cash, to secured that with a $1,700, old note that Mr. Merriam, your brother was endorser on?

A. Yes, sir.

Q. And so you really got cash, that amount, out of that trade?

A. That's what that statement shows.

Q. Now as a matter of fact did your brother on the purchase of that property pay you any cash at all?

A. Oh, yes, sir.

Q. How did he pay you in cash or by check?

A. They gave me New York exchange.

Q. How much was that?

A. I brought home $25,000, and then brought home this $5,000, note there, which I used at the First National Bank.

Q. That was to be secured by this $20,000, stock?

A. Yes, sir.

Q. Now what became of the balance of that $73,000?

A. That statement shows it.

Q. Did they turn that over to you, or did you leave it with your brother?

A. He took $73,000, and paid all the notes up there, and then he turned over the money to pay all the paper down here.

Q. What was actually done with the money; you got $25,000, and he took the balance?

A. Yes, sir.

Q. Now what did you do with the $25,000, that you brought down here?

162 A. That statement shows that.

Q. You used it in paying off debts?

A. Yes, sir.

Q. Now practically all of the debts you paid off down here, were

notes or obligations upon which your brother was bound as security or endorser?

A. Yes, sir, the obligations which he was on as endorser, and other debts.

Q. And didn't he exact from you the obligation when you left New York, that you would apply that $25,000, in the payment of obligations upon which he was endorser?

A. Yes, sir; he said I know you will do it if you say you will; you take that money down there and pay off those notes with my name on it, and I said I would.

Q. Did he not ask you to let him do it in the first instance?

A. No, he said if I would do it, he would be satisfied; if I said I would do it, he knew I would.

Q. Otherwise he would do it?

A. Yes, sir; or send Mr. Robinson down here?

Q. He proposed to send Mr. Robinson down here did he?

A. Yes, if I didn't pay off these obligations; and I said you know I will do it, if I agreed to it, and he said all right.

Q. And if you would not agree to it, he would send Mr. Robinson down to take up the paper?

A. Yes, sir.

Q. Did or not Mr. Robinson come down with you to do it?

A. No, sir.

Q. And the balance of the money he kept; do you know what he did with it?

A. He turned over a good many of the notes to me; I have the notes here.

Q. What notes were here, were they notes that he was obligated on?

A. The $10,000, note and the different notes scheduled in the report.

Q. And he kept the money for that purpose?

A. Yes, sir.

Q. Now, Mr. Merriam, had your brother ever been sued on any of these obligations?.

A. No, sir.

Q. Those notes that were held by banks in Syracuse,
163 N. Y., represented money that was to be used strictly on account of the credit of your brother?

A. Yes, sir; that he was endorser on.

Q. And the banks loaned the money on his credit?

A. Yes, sir.

Q. And he obligated himself that you would pay those notes out of the funds coming from that?

A. Yes, sir.

Q. And in addition to those notes he got $23,640 on the debt that you owed him?

A. He would not get that entire amount when you take into consideration the discount.

Q. Don't your statement show you paid him $23,640?

A. Yes, sir; the statement shows everything I paid him.

Q. Now when you made this trade with your brother nothing had been said about the money being turned over to him for this purpose?

A. Yes, sir; my brother had as serious an operation performed on him as anybody could and live, and before this time he had not pressed me for what I owed him, and when he got up—he had cancer of the stomach—and when he got up he said he wasn't able to write to me during that time, and had Mr. Robinson to attend to his business, and when he got up he wrote me, and he said, I will take the land before the option is out, and if he was well enough he would come down with Mr. Robinson, and see if he could not sell it; he had some parties up there that he believed he could sell the land to, and if he done so, he would ask me to pay up what I owed.

Q. When was that?

A. That was last November before he got down, is when he wrote me that letter.

Q. And that's the first time he began to press you?

A. Yes, sir.

Q. He knew you were very hard up, didn't he?

A. He knew I needed money, of course.

Q. And he had known that for some time?

A. Yes, sir.

Q. And he practically backed you, didn't he, in your business?

A. He backed me, yes, sir.

Q. When you found in New York that the amount of money that you were going to get from your land was decreased by $10,000, and that you would have very little with which to satisfy the demands of your creditors here, you were very much disappointed, were you not?

164 A. Yes, sir.

Q. Did you say anything to your brother at that time or any of them, about the condition it would leave you in down here?

A. I didn't say anything to Robinson, but the next Monday morning I told my brother.

Q. What passed between you with reference to your local creditors, and the condition you would be left in?

A. My brother told me, or I told him, I believed I could arrange matters here until I could close out the business, and arrange matters with my creditors, that I believed I could get along until I could do that.

Q. Did you tell him how much goods you had in your store?

A. No, sir.

Q. He knew though how much you had, did he not?

A. He knew I didn't have a large stock.

Q. Your stock was really worth about $100,000, wasn't it?

A. I think the stock was worth considerably more than that.

Q. You had no other funds, had you?

A. No, sir.

Q. Well, did you state to him that it would embarrass you very much if anything was said about that?

A. No, sir; that wasn't discussed.

Q. Was the question discussed as to the means you had employed to satisfy your creditors around here?
A. No, sir; only he got me that extra credit, you know.
Q. The $8,300?
A. Yes, sir; that really was $10,000.
Q. On that stock?
A. Yes, sir.
Q. And had nothing passed between you and your brother or Robinson in reference to how you would satisfy your creditors down here?
A. I didn't see Robinson on Monday.
Q. Now was anything said up there at that time about the mortgage you had made in 1897 to your brother?
A. No, sir.
Q. That wasn't discussed?
A. No, sir.
Q. When was the last time that you and your brother discussed that mortgage, have you any recollection about that?
165 A. He said, I don't know exactly the time, but some little time before that, that he could not carry this deal through, that he wanted that mortgage put on record, and I agreed to do it.
Q. Sometime ago?
A. Perhaps [illegible] days.
Q. Now he wanted you to put that mortgage on record?
A. He said he could not carry the deal through.
Q. Did he have the mortgage at that time, or did you?
A. My son was the Trustee at that time.
Q. Where was it kept?
A. I do not know, you will have to ask him.
Q. As a matter of fact, wasn't it kept in the safe at your store?
A. Not that I know of.
Q. When was the last time you saw that mortgage, before it was brought here in court?
A. About two years ago.
Q. What occasion did you have to get it out?
A. He was down here on a visit with his family.
Q. In what connection was the matter brought up?
A. The mortgage had been kept in the safe, but my son was the custodian.
Q. Did he call for it?
A. Yes sir, he called for it.
Q. Who got it?
A. He got it; my brother did.
Q. Did he return it to you?
A. No sir, that was the last time I ever saw it.
Q. It was put back in the safe, was it?
A. No, sir, it wasn't put in my safe.
Q. What has become of that $35,000 note?
A. I have got that at home.
Q. How long have you had that note?

A. When we made the settlement on that Monday, it was turned over to me.

Q. And your brother has had it ever since it was executed?

A. Until that time; he said after he paid everything up, he would send me the notes.

Q. Has he sent those notes to you yet?

A. No, sir.

Q. What is the name of the corporation that your brother conveyed that property to?

A. I think, the Tennessee Iron, Lumber and Coal Company.

Q. Where was it organized?

166 A. Albany, N. Y.

Q. Do you know who the stockholders are of that corporation?

A. I do not know all; I know my brother is the largest one, and Mr. Miller and Mr. Sisson and Mr. Robinson.

Q. Do you know the total amount of the capital stock?

A. $1,000,000.

Q. Your brother conveyed the property to the corporation in consideration of stock, didn't he?

A. I suppose he did, I wasn't in the stockholders' meeting.

Q. Do you know how much stock your brother has in that corporation?

A. I think he said he was going to take about $75,000; they wanted to raise $250,000; I suppose $250,000 or $300,000.

Q. That was the total amount of money they were going to raise to buy this property, and have some left as capital?

A. Yes, sir.

Q. For how long a time has your brother been helping you by endorsing your paper and loaning you money?

A. I think back about ten years ago.

Q. And he advanced you $10,000 before this mortgage was made?

A. Yes sir.

Q. And at the time that this mortgage was executed, you owed him money borrowed and on account of endorsements about $35,000?

A. Yes, sir.

Q. Has that amount increased or decreased since that time?

A. Increased.

Q. And most of this paper that you owed to banks were 60 and 90 day paper, wasn't it?

A. Yes, sir.

Q. And you are constantly in communication with your brother in getting paper renewed and extended?

A. Yes, sir.

Q. Has your brother ever refused to go on any paper for you?

A. No, sir.

Q. Has he had to furnish you money to pay your discount at any time?

167 A. No, sir.

Q. Hasn't he from time to time advanced you small amounts by check or otherwise?

A. He has never sent me any checks; when I needed money bad, I drew on him.

Q. And you have done that from time to time?

A. Yes, sir.

Q. Didn't you about that time have to meet the interest on your many obligations?

A. No, sir.

Q. Have you at any time made him a statement of your property and liabilities?

A. No, sir, he never asked me for one.

Q. Have you at any time discussed your financial condition with him?

A. I think two years ago when he was here, I told him at that time.

Q. You told him what you were owing at that time?

A. Yes, sir.

Q. Your indebtedness has increased since two years ago mainly on account of accumulated interest on your debts, hasn't it?

A. Yes, sir.

Q. And not on new obligations made by you?

A. No, sir, I have not made any new obligations, only one obligation to pay another.

Q. Merely borrowed from Peter to pay Paul?

A. Yes, sir.

Q. When he was here about how much stock did you have in your store, do you know?

A. We had a very good stock then.

Q. Does your book show how much you had?

A. I expect so; we had probably from $10,000 to $15,000 stock.

Q. He had been generally familiar with your financial condition?

A. Not wholly; he has not asked me very much about it; but about two years ago I told him how I stood.

Q. But he was generally familiar with the real-estate you had in town?

A. Yes, sir.

Q. Did you go to examine it with him?

A. I think at one time he was riding out with me on Montgomery Avenue when he was here, he had his family with him, and I told him we owned that property there and some over there, pointing it out to him.

168 Q. You told him when he was here two years ago about the real-estate you had?

A. I told him I had some property there, but he didn't ask its value.

Q. He knew about what assets you had?

A. He knew I had considerable real-estate.

Q. And the real-estate you had wasn't scheduled in this cause?

A. Yes, sir.

Q. When you were negotiating this trade with him in May, at the time it was closed on the 1st day of June, didn't you make known

to him the fact, or did he know the fact, that you were very hard pressed by your creditors, and was in bad financial condition?

A. He knew I needed money.

Q. And needed it pretty badly?

A. Yes, sir, b' t I did- t tell him how badly I needed it, but he knew I needed money, of course.

Q. Have you had any correspondence with him about your financial matters before this trade went through?

A. I mentioned to him that I wanted him to push the sale of the land as quickly as possible, as I needed money, and wanted to settle up my affairs.

Examination of witness by Mr. J. H. McLEAN:

Q. When you and Mr. Story dissolved partnership how did the firm stand then, were you in debt or not?

A. Yes, sir, the firm was in debt.

Q. How much?

A. I don't recollect now; there was $10,000 that we owed over at the First National Bank; we owed that there to my brother.

Q. Did that clean up all of the indebtedness?

A. No, sir.

Q. What was left in round numbers?

A. I owed Story too.

Q. You owe him still, don't you?

A. Yes, sir.

Q. What do you owe him outside of the amounts you agreed to pay Story?

A. I think we paid Story $5,000 at the time, and I paid him $1700 afterwards.

Q. Well, did you owe anybody else besides this $10,000?

A. Yes, sir.

169 Q. About how much?

A. I do not know just what it was at that time.

Q. What did your stock amount to on hand at the time that you and Story dissolved?

A. When they invoiced the 1st of January I was away, but I think the invoice amounted to nearly $15,000.

Q. How much did Story get for his half interest?

A. He was to have $17,000.

Q. That included the real-estate as well as the personalty?

A. He didn't have anything to do with the real-estate.

Q. You gave him $17,000?

A. I gave him the difference.

Q. You say you only had $17,000 stock on hand.

A. I had between $13,000 and $15,000 stock.

Q. How much did Story have in that?

A. A half interest.

Q. And for his half interest you gave him $17,000?

A. He had a large number of accounts, you know.

Q. What did they amount to?

A. I expect we had $25,000 worth.

Q. Have you collected all of those up since then, except what you have turned in, in your schedule?

A. I didn't owe over about $5,000 for merchandise.

Q. Did you owe any indebtedness outside of your business?

A. At that time?

Q. Yes, sir?

A. Yes, sir.

Q. What did you owe for?

A. I owed Mrs. Vann and others.

Q. What did you owe at that time that you have not paid?

A. Well I would have to look the accounts through to answer that.

Q. Can't you give us a general idea?

A. No, sir; I cannot.

Q. What were these debts for?

A. That I had made?

Q. Yes, sir.

A. Well I made them for merchandise to run my business.

Q. Outside of the store business I mean?

A. I have not made many debts outside of that.

Q. You say you owed the Vann debt, what other debts did you owe?

170 A. A good many debts at the time.

Q. Will your books show that?

A. Yes, sir.

Q. Now will you please get and furnish us a schedule of the personal debts you owed at that time, at the time that you and Story dissolved partnership?

A. I will, as near as I can; a great many of my private debts are not on the ledger.

Q. You stated, I believe, that the firm debts consisted of the $10,000 to the bank and the amount that you owed Story?

A. Yes, sir; and merchandise also, and we may have owed others.

Q. Will you please give us a statement of that too?

A. I don't know just what debts I did owe.

Q. That debt of $10,000 you owed the bank at that time?

A. I owed other obligations at that time. Do you want the indebtedness of Merriam & Story at that time?

Q. Yes, sir; at the time that you and Story dissolved partnership?

A. All right I will do that as far as I can; no man can go back ten years and make out everything he owed.

Examination of witness by Mr. A. W. CHAMBLISS:

Q. Mr. Merriam you were asked to file a complete statement showing in detail what disposition you made of the proceeds of the sale of the Cumberland County lands, and showing what debts or claims you discharged with these proceeds, and the dates when these debts were originally created; have you prepared now such a statement, and have you that statement to file?

A. I have prepared that statement to the best of my ability, in which there may be some errors, but I think it is correct.

Q. And you now file that statement?

A. Yes, sir; I file that statement.

Q. Have you also here and do you now file the notes and other evidences of indebtedness called for on this statement?

A. Yes, sir; I file those also, the checks and notes.

Q. You testified with regard to a note of $35,000, executed by you to your brother contemporaneously with the execution of the deed of trust which you have filed, have you now that note
171 with you, and if so, please file that as an exhibit to your deposition?

A. Yes, sir; that is the note, and I file it as an exhibit to my deposition.

Q. You were asked by Mr. McLean to file a statement of the liabilities of the firm of Merriam & Story at the time when Mr. Story withdrew from the firm, which was according to your statement February 6, 1896?

A. Yes, sir.

Q. Have you prepared such a statement, and if so, please file it as an exhibit to your deposition?

A. Yes, sir; I have prepared the statement, and this is the statement, and I file it as an exhibit to my deposition.

Q. Does the statement show the indebtedness on February 6th, or if not, what does it show?

A. The indebtedness on February 1st, 1896, and March 1st, 1896.

Q. That was done in this way for what reason?

A. For what reason?

Q. Yes, state why it was made as of February 1st and March 1st, 1896?

A. We took it that way from our ledger of monthly statements.

Q. Are the notes and checks filed by you all the evidences of payment of the money received from the mountain land, or have you any other notes which have not been filed?

A. There may be three or four notes that have not been filed, but I think I have there either a check or note to represent what was paid out.

Q. I will ask you if you will make a further search, and file such other notes as you may be able to find?

A. I will, yes, sir.

Q. Have you turned over into the court all of your assets of every description?

A. I have with the exception perhaps of some articles of furniture.

Q. You mean of that furniture that is exempt to you?

A. Yes, sir.

Q. The amounts shown on these several statements to have been paid out by you, together with what you have turned into this court covers all of the property of which you were possessed?

A. Yes, sir.

172 Q. Now in making these disbursements of this fund derived from the sale of the Cumberland Mountain land, did

you have any intentions of making any illegal preference prior to the bankruptcy?

A. No, sir; I did not.

COURT: That's incompetent; the court infers the intent from the act itself.

Q. I will ask you if you are familiar with the provisions of the bankrupt act?

This question was objected to, and sustained by the court.

Q. Mr. Merriam's reference has been made to certain correspondence of yours, and to certain statement- of yours to various creditors, to the effect that you at the time these statements were made, believed yourself to be possessed of property largely in excess of your liabilities, state now whether or not as a matter of fact you did believe when you made these statements that the value of your property was in excess of all you owed?

A. I believed it was; it probably cost me two — three times as much as I owed; or to have paid what I owed.

Q. As an illustration, Mr. Merriam, what did the property on Montgomery Avenue, on which the parties represented by Mr. Tatum, have a mortgage for about $6,000, cost you?

A. $15,000.

Q. Mr. Merriam your real estate is appraised at about $40,000, can you state about how much more that cost you?

A. I think it cost me at least $100,000.

Examination of witness by Mr. GEO. D. LANCASTER:

Q. When did you buy your various real esate, that is, how long have you owned it?

A. Well I bought some of it as long ago as 15 years.

Q. You have had practically all of it over 15 years?

A. Yes, sir; the best part.

Q. You bought it all during the boom, or a little after the boom?

A. I bought some of it before the boom and some afterwards.

Q. The prices after the boom bursted, considerably tumbled, didn't they?

A. Yes, sir.

173 Q. And following the panic of 1893, and up to within the last two years, prices have changed very little, have they not, the market value I mean?

A. There has been but little change I think since about that time.

Q. And since the time you bought that property, property in the same neighborhood sold for a very much less price than what you originally gave for your property, isn't that correct?

A. Some of it, yes, sir, I think so.

Q. And you have known that fact during all this time?

A. Well, I have known of some property selling lower than what mine cost me, but in the last two years property has been advancing some.

Examination of witness by Mr. B. E. TATUM:

Q. You say that property on Montgomery Avenue, on which Mrs. Vann holds a deed of trust, cost you $15,000?

A. That's the property that you have a deed of trust on out on Louise street.

Q. I will ask you if you didn't state in answer to the question asked you by Mr. Chambliss a few moments ago, that the property on Montgomery Avenue on which Mrs. Vann holds a deed of trust, cost you $15,000?

A. I had reference to the Curtis Addition.

Q. Then you mean to say that all the property on which she holds a deed of trust in South Chattanooga, cost you about $15,000?

A. No, the three lots on Montgomery Avenue are separate from the lots he mentioned.

Q. What did those three lots on Montgomery Avenue cost you?

A. I do not recollect just the amount I gave for those lots.

Q. When did you buy those lots?

A. About the time or a while before I bought the 27 lots.

Q. That was about 1890 or 1891, wasn't it?

A. About that time I think, yes, sir.

Examination of witness by Mr. WOODARD:

Q. Mr. Merriam I see in this statement of moneys you
174 paid Thomas Merriam on June 1st, 1903, you include various *times* of interest paid on notes, what was the rate of interest?

A. Six per cent per annum.

Q. Then here is a note of $10,000 March 1st, 1897, would that amount to $4,397.97?

A. Yes, sir.

Q. How do you figure that?

A. Figure each year the interest at six per cent.

Q. You compounded the interest did you?

A. Yes, sir.

Q. It would be $4,300, at six per cent.?

A. Yes, sir.

Q. Then did you compound the interest on all of the notes?

A. On all of the notes that had been made for each time was compounded, yes, sir.

Q. This $10,000, note of March 1st, 1897, simply calls for payment with interest on demand, don't it?

A. I think so; that note shows for itself.

Examination of witness by Mr. A. W. CHAMBLISS:

Q. I hand you herewith note for $35,000, dated September 24, 1897, payable to Thomas Merriam, is this the note that was given at the time the deed of trust to Thomas N. Merriam, Trustee, was executed?

A. Yes, sir.

Q. I will ask you to file this note as an exhibit to your deposition?

A. I will file this note as an exhibit to my deposition, yes, sir.

Q. I will ask you, Mr. Merriam, if you will identify the exhibits filed with your deposition, and mark them by letters or numbers, and indicate on the statement which exhibits refer to each item of the statement?

A. I will do so, yes, sir.

Examination of witness by Mr. GEO. D. LANCASTER:

Q. In your statement filed this morning, showing the disbursements made of the funds realized from the sale of the Cumberland mountain coal lands, you have this item "Note to Merchants' National Bank, Syracuse, N. Y., endorsed by Thomas Merriam, this was a renewal of a note of $2,828.00, March 24, 1897, and
175 carried from time to time, note matured 24th of April, 1903, amounting to $5,229.82, and interest thereon to the 1st day of June, 1903, $59.28, making a total of $5,289.10, now do you mean to say that in the renewal of that original note $2,828, originally made 24th of March, 1897, that you paid any of the interest or discount on those notes?

A. The interest and discount was added to the new note each time it was renewed; it explains itself below there.

Q. Then each time that note was renewed, the discount was added to the note?

A. Yes, sir.

Q. And that's true of all of the notes you have listed here, which was originally made at the Syracuse bank?

A. All of those three notes.

Q. And during all the time you never paid a cent of interest.

A. Not on the three notes.

Q. Why didn't you pay interest on them?

A. Well because my brother was more able to carry the interest than I was, and the notes were renewed from time to time, and I used the money in my business.

Q. Then you were not able to pay the interest on the notes when they were renewed, and you got your brother to persuade the bank to add the interest to the notes when renewed?

A. No, sir; I didn't get him to do that; he simply done it to help me along.

Q. Why did he do that to help you along; did he know that you were unable to do so, unless he procured the bank to add the interest to them?

A. No, sir; he didn't know that; interest up there was lower.

Q. He never paid any interest on the notes, did he?

A. No, sir; he added it to the notes.

Q. Did the banks make any demand on you for the interest when the notes first matured?

A. No, sir.

Q. Did you have any arrangements with the bank?

A. I did not.

Q. Did he?

A. I do not know.

Q. When the notes were first renewed, what passed between you

and your brother and the bank as to the discount on the renewal of the first note?

176 A. He simply sent the note to me for our endorsement, and the interest was added to the note.

Q. And he did that because he knew you needed the money badly down here, and could not afford to pay the discount?

A. I do not know of any arrangements of that kind.

Q. Do you know of any other reason why he did that?

A. No, sir.

Q. So during the time that these notes had been renewed, these three notes, which aggregate something like $14,000, they had practically been doubled by the accumulation of interest compounded and added to the principal of the note, as each note was renewed from time to time?

A. Yes, sir.

Q. Now you have this statement in your memorandum, referring to the three notes about which I have been asking you, the statement is as follows: "To the principal of the above three notes has been added from time to time interest, discount and exchange on various paper renewed, drafts drawn, drafts discounted at Merchants' National Bank, Syracuse, N. Y., etc.," what do you mean by that statement?

A. I mean the interest on those drafts were never paid, they were simply renewed, and when one of those three above asked about, and not added to these two accept- — to the note that was renewed.

Q. You mean to say then that during the last six or seven years you have had other indebtedness at the Syracuse Bank in addition to these drafts, and the interest on notes came due, he added the interest on the other drafts the other drafts have been added to these three notes, about which I have been asking you?

A. Yes, sir; and they are down on that schedule.

Q. Please point out all of the other drafts you have had at that bank since 1897?

A. Here is one, $1,500 and $1,500, and that $1,000, and that $1,000, and that $1,000, I think that's all; there was about $10,000, in that paper in all; that he carried there besides the three notes, I think.

Q. Now take the first item you have mentioned in your last answer "Acceptance discounted at Merchants' National Bank, $500.00, borrowed June 22, 1896; $1,000, borrowed October 4, 1898," do you mean to say that all the discount on those two acceptances and the renewal of those acceptances had been

177 added to the three principal notes above asked about, and you hadn't otherwise paid them?

A. Yes, sir.

Q. Then you paid no discount at all on those two acceptances?

A. No, sir.

Q. Why was the discount or interest on the two acceptances I have spoken of added to the other three notes above asked about and not added to their two acceptances?

A. Because they were drawn differently; say I would draw

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through the First National Bank and send it there, and I send on an acceptance to take up the draft drawn.

Q. Why didn't you incorporate in the acceptance to take up the draft, the amount of interest charged on the draft?

A. The drafts were finally paid here; the acceptances were paid here.

Q. If you owed up there an indebtedness of $500.00 on a draft made June 22, 1896, and when that matured, you sent on a new draft of acceptance, what need was there for doing anything in Chattanooga if that was a renewal of the original draft?

A. It was done this way; it is a common thing in business to draw a draft for instance, $1,500, for sixty days; I draw a draft simply at sight and send an acceptance on to my brother to take up that draft when it arrived, and if that acceptance became due, it was made payable at the Chattanooga Savings Bank, and I draw an acceptance the same as before, and the drafts were paid here at Chattanooga.

Q. These drafts or acceptances which you have scheduled on this list of disbursements made, do not include all the drafts since 1896 and 1897 you have drawn on your brother or the Bank of Syracuse?

A. I do not remember any particular draft.

Q. In other words, you have had other and additional drafts and acceptances made on the Bank of Syracuse and your brother since 1896, which have been paid and are not scheduled in this list?

A. We have paid some along I presume.

Q. And as a matter of fact, since 1897 you have had a great deal other and additional paper upon which your brother was liable as endorser at the Bank of Syracuse, and which you have paid, otherwise than as shown by this statement here of disbursements made?

178 A. No, sir; not a great deal of paper; there may have been $500, or something like that.

Q. As a matter of fact, since 1897 you have paid practically nothing to your brother or the Bank of Syracuse on any obligations of any kind whatsoever.

A. No, sir; unless it would be a draft of $500, or something like that; there may perhaps have been something like that.

Q. The point I am asking about is this, these disbursements from the funds coming from the Cumberland Mountain coal lands, which were made in taking up paper at the Bank of Syracuse, upon which your brother was liable as endorser or otherwise, do they represent renewals of all the obligations you and your brother owed together at that bank since 1897, or have you since 1897 owed other and additional obligations there which you have paid otherwise, and at other times?

A. Practically those represent all I have paid; but I say there may be a small draft or two that I have drawn on him that have been paid.

Q. So practically since 1897, this large indebtedness has been renewed from time to time, and you have not been often able to pay any of the interest on it?

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A. I say may be a small draft or two I have paid.

—. With this exception of an occasional draft, you have paid nothing?

A. No, sir.

Q. And your interest has been allowed to accumulate and compound during this time, six or eight years?

A. Yes, sir.

Q. And your brother has done that to help you out here?

A. Yes, sir; he has done that to help me along.

Q. Because you were hard up?

A. Because I needed the money.

Q. And you were hard up?

A. Some of the time I have been, I suppose.

Q. Haven't you been all of the time?

A. No, not all of the time; I have gotten along in my business some of the time very well.

Q. During the last seven or eight years, you have been all that time insolvent, haven't you?

A. Not according to my idea.

Q. But as a matter of fact, you have been, haven't you?

A. I don't think so.

179 Q. Has there been any time in the last seven or eight years, your property taken at a reasonable market value wasn't worth much less than all your liabilities?

A. I had the hopes of paying out all I owed.

Q. I am asking you about the fact of the matter; isn't that correct?

A. I cannot say it is.

Examination of witness by Mr. A. W. CHAMBLISS:

Q. Mr. Merriam, have you a memorandum showing the amounts which you owed to your brother and of which he was liable for you about the time of the execution of the mortgage for $35,000, before referred to, if so, will you please file that with your schedule?

A. Yes, sir; this is the memorandum, and I file it.

Examination of witness by Mr. J. M. TRIMBLE:

Q. Mr. Merriam, among the property that the Receiver reported was some North Chattanooga lots, and the First National Bank holds some of the North Chattanooga Land Company's stock, is it not a fact that the agreement among the stockholders of the North Chattanooga Land Company was, upon the surrender of that stock they should make deeds to the property?

A. Yes, sir.

Q. And is it not a fact that the lots which the Receiver reported were the lots which were to be exchanged for this stock that the bank holds?

A. They were three lots, yes, sir.

Q. Who are the present officers of the North Chattanooga Land Company?

A. R. M. Barton, Jr., was President, and I am Secretary.

Q. Have you that deed in your possession?

A. I have the deed, yes, sir; it wasn't put on record on account of the stock being owned by the First National Bank and Mrs. Reeves.

Q. Wasn't it understood between you and those parties that you would get back that deed and have deeds made to them for these lots?

A. I told them I would not have the deed put on record as long as they held the stock.

Q. There is no other property of the North Chattanooga Land Company to satisfy that stock except these lots?

180 A. That is all.

Q. Have they other property still?

A. I do not know.

Q. These particular lots are the lots which were set off against this particular stock, are they not?

A. Yes, sir; those particular lots are.

J. B. MERRIAM.

Sworn to and subscribed before me Aug. 20, 1903.

D. L. GRAYSON, *Referee.*

By Mr. LANCASTER:

Q. The paper which I hand you, which was filed here on Monday, is that a statement of the obligations which were to be taken up by your brother in New York out of the funds you left with him?

A. They were taken up before I left there.

Q. Will you please make that statement as exhibit to your deposition?

A. Yes, sir.

Q. This morning you testified about the dates of the obligations which were due direct to your brother. I now want to ask you when the three debts were created mentioned about the middle of the column, namely, a note of $1,000, bearing date March 4th, 1903, a note of $1,500, dated March 16th, 1903, and a note of $1,250, dated April 16th, 1903. When were those three debts created.

A. They were renewals on notes from time to time, 60 and 90 days. I do not know when they started. I would have to go to our ledger to state that.

Q. You do not know when they were created?

A. No, sir; they were renewed from time to time.

Q. The statement marked "X" has a list of notes described at the Merchants Bank, bearing date March, April and May, 1903. Can you tell when those debts were created?

A. Like the others they were dated back and renewed from time to time.

Q. Do you know how many years old they are?

A. No, sir; I cannot tell.

Q. Will your books show?

A. My ledger will show it. I will have them traced out.

Q. In your list of debts paid, filed as an exhibit this
181 morning, you have a number of notes at the First National Bank of this city, which you paid, and upon which it was claimed that your brother was endorser. Can you tell us the history of those notes? When they were created and how old they are; the whole list?

A. The $10,000, note was created when I dissolved with Mr. Story about 6 years ago.

Q. Was your brother endorser on that?

A. Yes, sir; when it was given.

Q. We failed to see in your list the item of a ten thousand dollar note to the First National Bank. Please explain what you mean?

A. The first National Bank held as collateral security against my brother; that is he was the endorser of $10,000, and we discounted the paper to cover that note and renewed it from time to time; one note of $3,500, one of $2,500, and one of $4,000, which made up the $10,000, and we renewed that from time to time and paid the interest on it, and when I took up these notes they surrendered the $10,000, note.

Q. Then you mean to say that the bank held the $10,000 note of your brother as collateral security for these three notes on your list, which aggregate $10,000?

A. Which did not have my brother's name on them; renewed from time to time.

Q. Why was it, and how was it that $10,000, note of your brother's was pledged as collateral with the First National Bank to secure these three notes?

A. Merriam & Story owed that money when we dissolved partnership, and Mr. Montague wanted some security and I told him that I would get a collateral note of my brother's, and he said that would be satisfactory.

Q. When were these other notes created to the First National Bank?

A. Here is one Tom Merriam $500; another note Tom Merriam $500, one T. T. Wilson $500, and another endorsed by Tom Merriam that came from the City Savings Bank. I owed them, and Mr. Montague bought this note, and I gave my brother as security on that note. Mr. Montague bought that note and I took it up the other day, and also those three other notes I mentioned. The $500 note was renewed from time to time, and the one to my brother and the one to T. T. Wilson.

Q. Here is a note of $2,100, to K. P. James, endorsed by Tom Merriam?

182 A. That is also endorsed by L—— and H——.

Q. When was that made?

A. At the same time when that come out of the City Savings Bank. K. P. James had bought up certificates from time to time, and I was owing the bank and he wanted that note and L. & H. endorsed it to my brother, and he surrendered his certificates in the bank and took that note.

Q. When was that?

A. When the bank made its final settlement. It has been over two years ago; nearly three years I think.

Q. You have some notes here to the Chattanooga National Bank that were paid, on which your brother was endorser?

A. Those notes were created at the Third National Bank and transferred to the Chattanooga National Bank.

Q. When were they created to the Third National Bank?

A. About three years ago I think. I cannot tell.

Q. Your brother went on them at the time as endorser?

A. Yes, sir.

Q. So as a matter of fact many of the debts that you have recently paid off, and upon which your brother was endorser, were created within the last three or four years?

A. Some of them, yes, sir.

Q. Many of them were?

A. Yes, sir; part and part before.

Q. Isn't it a fact that many of these debts at the Syracuse Bank have been created within the last three or four years?

A. Within the last three or four years, yes sir. Perhaps back as far as five years. The $10,000, note was ten years ago.

Q. As a matter of fact most of these debts which you have paid off, and upon which your brother was endorser, do not date back further than 5 or 6 years, with the exception of that ten thousand dollar note and interest. Isn't that so?

A. I think most of it would be between now and ten years. I would have to have a statement of that.

Q. Your books will show will they not?

A. Yes, sir; it has been in the last ten years.

Q. As a matter of fact nearly all of them were created within the last 4 or 5 years?

A. Five, seven and eight years.

183 Q. Which of these debts, outside of the $10,000, note was created beyond 5 years from this date?

A. I think probably this largest note for $5,229, was.

Q. You do not know do you?

A. I do not know positively, but I know the interest was so large on it. It was only $2,500, or $3,000, when it started and interest run it up to that. It was renewed every 90 days.

Q. Were all of those that were discounted at this bank in Syracuse handled in the same way, the discount added to the principal?

A. No, sir. The one for $5,229.82 was. The one for $7,425 and the one for $3,921.21 was, and the rest were not.

Q. How much were they when they were originally made; in other words what parts of those represent the principal and how much the interest?

A. That has been running a number of years, and it is impossible to tell, unless I refer to my books. You cannot carry notes in your mind.

Q. Referring again to this statement "X;" one column represents the principal of those notes taken up, and the other the interest?

A. Yes, sir.

Q. As matter of fact you paid your brother and he took out of the purchase price $5,241.04 which you owed him?

A. Yes, sir.

Q. And in estimating that interest he charged you at the rate of 7 per cent. and compounded it, didn't he?

A. No, sir.

Q. Look at your statement, filed here this morning, which I mark "Y," and which purports to be a calculation of that interest, and explain why it is that opposite the column of interest you have the word "compound" written there?

A. I am glad you asked me that question; it gives me an opportunity to explain it. Now you take that $10,000, and the interest that you will find is figured up right, 6 per cent., and the interest is added to the note each year; that is interest added to the interest each year and that runs down all right. I had that figured myself. There is a little difference between Frank's figures and the figures of my brother's bookkeeper, but he is correct about it; I mean my brother's bookkeeper. Now in reference to this $5,229.82 note——

184 Q. He figured the interest on your ten thousand dollar note at 6 per cent.?

A. Yes, sir.

Q. And that was added to the principal?

A. Yes, sir; each year.

Q. And then there was interest charged on that?

A. Yes, sir.

Q. And you say that is not compound interest?

A. Yes, sir; the laws of New York allow him to do that.

Q. And he took all the law allowed him?

A. Yes, sir; I inquired about it to be sure that he done me right on that. Mr. Latta is president of the bank and he said that the laws of New York allowed anybody to compound interest. I told him I thought it was piling interest on me pretty well, and he said the laws of New York allowed anybody to compound interest, but they will not allow you to take more than that. If you do it ruins the note itself. You could not collect the principal or interest.

Q. So your brother got all the law allowed him?

A. Yes, sir.

Q. Did you object to that when he tried to charge you compound interest?

A. I told him it was running it up pretty well on me, and he said that was what I would have to pay the bank. In New York they do not allow a bank to charge over 6 per cent.

Q. Tell the circumstances under which that mortgage or deed of trust given to your brother in September, 1897, was made?

A. My brother wanted security. He was on these notes at the First National Bank, and other paper, amounting to $35,000 and he wanted security, and I gave it to him in order to help me carry these matters along. I made a statement to that effect to Mr. Montague at the time this mortgage was made.

Q. Was he here when the mortgage was made?

A. No, sir; he wrote and asked me for it.
Q. Have you got that letter?
A. No, sir.
Q. What became of it?
A. It was just a personal letter to me, and not to the firm, and I destroyed it. He was writing me along every once in a while and I did not keep any of the letters.
185 Q. What did he say about putting that mortgage of record?
A. At that time he said that whenever he demanded that it should be put of record that I should do so. He agreed not to put it of record unless he felt that necessity required it. He came down here two years ago and got the mortgage and put it in the hands of my son.
Q. Where did he get it?
A. From me, it was in the safe.
Q. You had held it in the meantime?
A. Yes, sir.
Q. Who drafted that mortgage?
A. Mr. Dorton, of Crossville, Tenn.
Q. Where did he draw it?
A. He drew it up there. I wrote him to draw it, as the records were all there. He was not my attorney at all, but I explained it to him and he drew the mortgage.
Q. Did you sign it here and send it to your brother? I mean the note?
A. Yes, sir.
Q. Have you seen that note since?
A. I have got the note at home. I took it up while I was up there.
Q. Did you see the note while you was up there?
A. When we made our settlement he had this note on file with the others. That note was in with the rest.
Q. When your brother was demanding of you the appropriation of that purchase money to the payment of the debts that you owed him, and the debts that you owed to other parties upon which he was endorser, did you say anything to him about the fact that you had promised to pay some other debts due in Chattanooga, upon which he was not endorser, and that if he insisted upon taking out his part that you could not do it?
A. That is the reason that he gave me the ten thousand dollar paper.
Q. Then you did suggest that to him?
A. Yes, sir; I told him I had other debts that I had promised to pay.
Q. Then he agreed to endorse a note for $5,000 and one for $3,300 upon condition that you would endorse to him the $20,000 stock in the new company?
A. Yes, sir.
Q. Did you tell him that, amount would be sufficient for that purpose?

186 A. I told him that I would see what I could do to get along, and believed that I could do so.

Q. Didn't you say that you would just do the best you could?

A. No, sir.

Q. Didn't you know that you could not do it?

A. No, sir; as I said this morning, the Vann matter, I was to pay that. Mrs. Vann wrote me a letter that she would like to have $2,500, C. Vann was 21 years old and wanted to go into business.

Q. When you were in Syracuse and made this trade with your brother, you then knew, and you have known ever since, that a fairly reasonable valuation of your property was largely less than the amounts of your debts?

A. No, I did not.

Q. And yet after paying out all of that money you have filed a list of $82,000 of liabilities here, with only property to the amount of about $40,000?

A. I estimated the property higher than that. The property cost me $150,000.

I. B. MERRIAM.

Subscribed and sworn to before me, August 20, 1903.

D. L. GRAYSON, *Referee.*

(Here follows "Deed of Trust." Exhibit with Deposition of I. B. Merriam.)

This deed of trust made on this September 24, 1897, witnesseth that we, Isaac B. Merriam and wife, Sarah E. Merriam, of Chattanooga, Tennessee, for the uses and purposes hereinafter set out, and none other, have transferred and conveyed unto Thos. N. Merriam, as trustee, the following real estate, to wit:

Being an undivided one-half (½) interest in two tracts of land lying in the 5th, 7th, 10th, and 12th Civil District of Cumberland County, Tennessee, and more fully described as follows:

First Tract: Grant No. 23822 from the state of Tennessee to Robert Burke and Elijah G. Haley, on the 17th of June, 1841, on Entry No. 2444 made September 28th, 1839. Beginning at a white oak marked "E. H." on the old line formerly dividing Morgan and Bledsoe Counties, 10 poles north of the old Walton road and by the Antioch road; thence with the meanders of said old line,

187 general course being S. 70 E. passing the Crab orchard brick house where John Burke once lived, at 320 poles, in all 1600 poles to a white oak marked "R. B." on said line, thence N. 20 E. 148 poles to a white oak marked P. H., thence N. 20 W. crossing a branch at 20 poles, in all 726 in all 350 poles to a black oak Black gum and hickory; thence N. 20 W. crossing a branch at 20 poles, in all 726 poles to a chestnut oak on the point of a ridge, thence N. 65 west 510 poles to a white oak marked "P. M. C." and four white oak pointers, this line crosses Water branch at Staples Camp; hence a direct line to the beginning, including 7500 acres; but excluding 2500 acres of superior claims, conveying hereby 5000 acres.

Second Tract. Grant No. 23823, from the state of Tennessee to Robert Burke and Elijah Haley, on the 17th day of June, 1841, on Entry No. 2450, dated October 31st, 1839.

Beginning at a white oak marked "E. H." on the old Morgan and Bledsoe County line, the beginning corner of the first trac*k* thence with said old county line, general course N. 60 W. 820 poles to a stake 10 poles north of John Kenner's old house; thence continue with said county line general course N. 40 W. 354 poles to a white oak, a corner to the Eastland grants in said line; thence north 35 deg. East 380 poles to a white oak marked "L;" thence south 60 E. crossing the track from John Kenner's to Jesse Mumpford's at 220 poles in all 404 poles, to a Spanish oak marked "P. C." and pointers; thence south 30 E. 298 poles to a white oak marked "P. M. C.," thence S. 80 E. 156 poles to a white oak marked "T. S." and pointers, thence N. 10 E. 138 poles to 3 white oaks, growing from one root; thence N. 60 E. 114 poles to a hickory in a flat north of a pine in a thicket; thence due east crossing Daddy's creek, 284 poles to a large white pine marked "E. G. H.;" thence N. 60 E. 74 poles to a white pine marked R. B. thence N. 67 E. 580 poles to a white oak last corner of first tract; thence a direct line to the beginning containing about 3000 acres, after excluding superior claims together with all the privileges and appurtenances to the same belonging.

To have and to hold the same land unto the said Thos. N. Merriam and his successors in trust forever, and we, the said grantors, do hereby covenant with the said trustee and his successors in trust, that we are lawfully seized and possessed of said real estate in fee simple have a good right to convey it and that the same is free and unencumbered and we bind our heirs and representatives
188 by these covenants, and we further covenant with the said trustee and his successors, and bind ourselves and our heirs and representatives, to forever warrant and defend the title to said land to the said trustee and successors; against the lawful claim of all persons whomsoever.

But this deed is made only to secure to Thomas Merriam the payment of one promissory note of even date herewith for thirty-five thousand dollars ($35,000.00), due one year from date without interest, and made and payable by the said Isaac B. Merriam, one of the grantors herein, and if said note shall be wholly paid when due then this deed will be void, will have performed its office and be for nothing held. But if said note is not so paid, then on the written request of the said Thomas Merriam, or the owner of said note, or part not paid, the said Thos. N. Merriam shall, after giving notice by advertisement in a newspaper published at Crossville, in said Cumberland County, Tennessee, for 60 days sell said above described real estate, or so much of it as may be necessary and apply the proceeds to the payment of the costs of this trust and to what ever taxes might be due on real estate and to the payment of whatever sum might be due on said note.

In case of a sale hereunder, the trustee shall have power and he is hereby directed to make a good and sufficient deed to the purchaser, conveying to him the land so purchased free from all right

of redemption or repurchase by the vendors, their heirs or assigns or representatives or creditors, but the title of the purchaser shall be absolute. But either of the vendors, their heirs, assigns creditors or representatives may bid at said sale as well as the said Thomas Merriam, his heirs and representatives.

If for any cause there should be no trustee to execute this trust, then the said Thomas Merriam, or the owner of said note or the amount due on the same shall have the authority to appoint, in writing a trustee who, when so appointed shall have all the powers and duties of one herein named and the title hereby conveyed shall vest in him as is now in the one herein. It is understood that the grantors are to keep the taxes paid on said real estate and if the said Thomas Merriam should have to pay the same to protect his said security then the amount so paid shall become a part of the amount secured by this deed and be collectible in the same manners as said note.

It is agreed that the trustees under their deed are excused from giving bonds for the faithful execution of the trust clothed upon them.

189 Witness our hands on this the 24th day of September, 1897.

I. B. MERRIAM. [SEAL.]
SARAH E. MERRIAM. [SEAL.]

I accept the trust hereby vested and clothed upon me. This the 24th day of September, 1897.

THOS. N. MERRIAM. [SEAL.]

Acknowledgment.

STATE OF TENNESSEE, *County of Hamilton:*

Before me, J. H. Springfield, a Notary Public, duly appointed, commissioned and qualified in and for the county and state aforesaid personally appeared I. B. Merriam and Sarah E. Merriam, the within named bargainors with whom I am personally acquainted and who acknowledges that he executed the within instrument for the purpose therein contained.

And Sarah E. Merriam, wife of the said I. B. Merriam, having appeared before me, privately and apart from her husband the said Sarah E. Merriam acknowledged the execution of the said deed to have been done by her freely, voluntarily and understandingly, without compulsion or restraint from her said husband and for the purpose therein expressed.

In testimony whereof, I have hereunto set my hand and notarial Seal at office in the City of Chattanooga, Tennessee, on this the 29th day of September, 1897.

[SEAL.] J. H. SPRINGFIELD,
Notary Public.

$3500.00. CHATTANOOGA, TENN., *Sept. 24th,* 1897.

One year after date, I promise to pay to the order of Thomas Merriam, Thirty Five Thousand Dollars at his office in Syracuse, N. Y. For value received this note is secured by deed of trust, of even date herewith, on my one-half interest in tract of land in Cumberland County, Tennessee known as the Burke & Haley grants.

I. B. MERRIAM.

190 In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

In re I. B. MERRIAM, Bankrupt.

H. F. ROGERS, Trustee, Petitioner,
vs.
THOMAS MERRIAM ET AL.

Depositions of Thomas Merriam, William Herbert Robinson, Anna M. Ernhout and Merriam Ernhout taken on behalf of the defendant on this 25th, day of August, 1903, at the office of King Waters and Page, Syracuse, N. Y., in the presence of Robert Pritchard and George B. Lancaster, Attorneys for Petitioner, and E. J. Page and Frank Spurlock, Attorneys for Defendant.

THOMAS MERRIAM first called and sworn deposes and says:

Q. Please state your residence, age and occupation.
A. 601 South Crouse Avenue, Syracuse N. Y. Sixty years of age. My occupation is manufacturer.
Q. How long have you resided and been in business in Syracuse?
A. Since 1865.
Q. What time did your brother, I. B. Merriam, go south?
A. I think about twenty-six or twenty-seven years ago. I should say about that time.
Q. When was the first loan by you to him, which was the beginning of his indebtedness to you as secured by the deed of trust executed September 24th, 1897.
A. I think the first loan was in '93 or '94.
Q. What was the amount of his indebtedness to you including endorsements on the 24th, day of September, 1897?
A. About $36,000.
Q. Had you before the execution of that mortgage and within a year or two before its execution, seen your brother in Chattanooga?
A. Yes, I was there in the spring of 1897, in the last of February or first of March.
191 Q. Did you have any conversation with him at that time about his business, if so, state about what it was?
A. Yes, sir; he stated to me about how his affairs were.
Q. Will you please give in a general way about what that conversation was?
A. My brother had been borrowing some money of me and I had

endorsed some paper for him at that time and I had been to Chattanooga on a visit. I had been down to Florida and I came up that way. He was in the Wholesale grocery business in Chattanooga, and he stated to me that he wanted to borrow some more money; it was suggested to me that I take an interest in the business; become a partner in the business there with him. I said that I didn't care to go into such a business as that. I had so much on hand of my own that I didn't care to become a partner in the business, although I was willing to loan him money and credit if he was worthy of it, that is, if his business was in such shape that he was worthy of it, and I thought it was doing him any good, I would be glad to do it, and he made a statement to me, showing what he had and what his liabilities were at that time, and I extended more credit to him. Would you like to have the amount of that statement.

Q. Yes, you can give it?

A. Well, the statement was that they had not less than thirty thousand dollars in stock in the store and from thirty to forty thousand dollars placed out in good accounts, and that he owned a large amount of real estate, some of which he enumerated to me as what he owned were a store that he was doing business in, and a lot upon the same street that the store was on, a vacant lot, and some property on Montgomery Avenue, and his house where he lived, and he then stated that he had a large amount of property vacant property—some across the river, and that he had a one-half interest in this Cumberland County Coal Company he called it. Well I told him to figure out about what he thought the property worth and he figured that his interest in the coal property, his one-half interest in the coal property and the real estate that he owned in Chattanooga, above incumbrance, was worth one hundred thousand. I understood there was no incumbrance on the coal property, but that there was ten thousand held by some Insurance Company, on the store, and I asked him how much he valued the store, making up that statement, and he said he valued the store at thirty
192 thousand, and I told him of course I wasn't familiar with the value of property in Chattanooga, but should think from towns of the same size north, that it was not an excessive valuation on the property; it ought to be worth what he claimed. I told him that a man wouldn't think of doing a business like that in Syracuse without a capital of one hundred thousand He claimed to have one hundred thousand dollars worth of real estate beyond all incumbrances: that would make him about one hundred and seventy thousand dollars, that he had altogether. I asked him how much he owed including what he owed me, and he looked it up and said, not to exceed forty thousand.

Q. How long after that, before the deed of trust securing the thirty-five thousand dollar note was executed?

A. On the 24th of September following: well, in February or first of March I was in Chattanooga, and this was the September following that the deed of trust was executed to me for thirty-five thousand.

Q. At the time of the execution of that deed of trust, about what

was his indebtedness to you including the direct indebtedness and endorsements?

A. About $36,000.

Q. State whether or not it was loaned to him at the time, or about the time, that you had this first conversation with him that you have detailed?

A. As I say, up to that time, that I had the conversation with him in March there was at that time, I had loaned him and endorsed for him to the amount of about $25,000.

Q. And the remaining $10,000 was between that and the execution of the deed of trust?

A. Yes, $10,000 or $11,000.

Q. Do you know who drew the deed of trust?

A. I don't.

Q. Were you at Chattanooga at the time it was drawn?

A. No, sir.

Q. I will ask you to state why the different notes were not described in the deed of trust instead of the one note of $35,000 which was kept and held by you?

A. I wrote to him; he wanted some more accommodation and I extended it to him, but I wrote to him that I thought he ought to have given a mortgage on his property to secure me for the loans and endorsements. He wrote back that he was perfectly willing to do that, and I had expressed when I was there the spring
193 before, my preference of the properties that he had, that is, I told him that my judgment was that he better sell the Chattanooga property, not carry that property, and my impressions were that there were better prospects for the mountain and coal land for future prospects; that there was more chance for it to increase in value and the expenses of carrying it were not so heavy. There was a good deal of this that was in endorsements, and of course they were liable to change; some were in one bank and some in another and some with individuals, and he said he would give me a deed of trust for thirty-five thousand dollars, give me this trust note as security for the other loans and endorsements.

Q. I will ask you to state why that deed of trust wasn't registered at the time, and if any thing was said about the registration?

A. Yes, sir; I asked him if the deed of trust ought to be put on record, and he said that it wasn't necessary as about all that he owed was his indebtedness to me, and a few more endorsements and that it could be put on record at any time, and he thought perhaps it might have a tendency to injure the sale of the land if he put that deed on record, and he didn't think it necessary, and that his partner would rather it wouldn't go on the property; he was partner in the property; and I told him that I wanted him to see good reliable counsel; that I didn't know much about the laws of Tennessee, and I knew that in the State of New York, a man holding a mortgage which is equivalent to a deed of trust, would have to record it, and I wanted him to see a good lawyer; and he went to see one and asked him if it was perfectly legitimate and legal that it should not go on record at once, and he said that the lawyer said

it was, and that he thought it was all right as there were no other large creditors. The only creditor that I knew of was the J. L. Brown Banking Company, and they knew at the time that I took the deed of trust. I told them of it; and they owed them about five thousand dollars at the time. I told them that I had taken a deed of trust for this purpose, to secure me for my claim.

Q. Do you know when this deed of trust was delivered to Thomas N. Merriam, the trustee?

A. I understood that it was delivered to him at once; at that time my nephew, Thomas N. Merriam—I wanted to make him the trustee of the deed as I had perfect confidence in him—and I corresponded with him about it.

Q. And you knew Thomas N. Merriam before that?

194 A. Yes, I had partially brought him up. He lived with me several years here in Syracuse; came here when he was six years old and lived here three or four years, then came back here when about sixteen years old and attended Syracuse University one year, then went back south again.

Q. When was the next time you were in Chattanooga after the year 1897?

A. Fore part of April, 1899.

Q. And I will ask you to state whether or not at the time you were in Chattanooga on this occasion, your brother, I. B. Merriam, stated to you in any conversation that his indebtedness would amount to between eighty-five and one hundred thousand dollars?

A. No, sir, I never heard any intimation of anything of that kind.

Q. During that visit did you have any conversation with him at all about his indebtedness or the state of his affairs there?

A. I did.

Q. What was the conversation then?

A. I asked him how he was getting along, and he said that he was getting along fairly well. I asked him if he was making any money in his business and he said they were, and I asked him how affairs stood and he said just the same as they did two years ago; before he had not been able to sell any real estate and of course real estate was very dull then and he said he didn't want to have any sale of it then, but he was thinking that he was going to be able to sell the mountain land in a very short time, and if he did, why he would be in fine shape financially and that he could pay all of his obligations and be in good financial shape. If he didn't sell some of his other land he said it would relieve him so that he could pay his other debts and carry on his business. He had made some money the year before in his business, the year that the soldiers were there he claimed to have done very well in business and made money, and that his affairs stood just about in the same shape as when he made the statement to me that he was worth one hundred thirty thousand dollars.

Q. Do you know who at that time was negotiating for the purchase of the coal lands?

A. He said some Chicago parties, I think, but I don't know who they were at that time.

195 Q. Who were the first parties that you knew of having such negotiations?

A. The first parties that I knew of were some parties that I interested here, Mr. Cogswell of the Solvay Process Company; this was several years ago; Mr. King and Mr. Cogswell.

Q. Was anything done by them of a definite character?

A. They sent a party there and examined the property; had an option on the property for one hundred thousand, given by him and Mr. Jarnagin, and they were to give ten thousand dollars if I made the sale, and they sent an engineer there and looked the property over and the engineer's report was of such a nature that they didn't close the deal.

Q. Do you know about what year that was?

A. I have an impression that it was '95 or '96, but I wouldn't state positively.

Q. It was before the mortgage was executed to you?

A. Yes, sir.

Q. Who was the next party you knew of that was negotiating for the purchase?

A. They had so many that I can't tell; they wrote me about different ones, but my impression is that there was a Chicago party whom I didn't know, but I wouldn't say for certain. There was a good many that they claimed were negotiating for it.

Q. Do you know of any man by the name of Robinson in this State, negotiating?

A. Yes, D. C. Robinson of Elmira.

Q. Do you know who the agent was who was trying to make the sale to him?

A. I think the matter was started by a man in Chattanooga. He was an Equitable Life Insurance agent, I think Sheridan was the name of the man who brought Mr. Robinson's attention to it.

Q. In the course of his negotiations did you have any conversation with him about it?

A. I saw Colonel Robinson about it.

Q. Did he know of the existence of your mortgage?

A. He did. He sent for me to come to Elmira to see him, to see if I couldn't get the option extended for six months; that he was sure of selling the property if I could get the option extended for six months, and I told him that I had a deed of trust on the property, on my brother's interest, and that I would see if I could get an extension from them. He drew up an extension for six months,

196 for two hundred thousand dollars, the price was to be, and I sent it on and recommended that they give him the extension of time; that I thought he was a man of very extensive acquaintance and influence among capitalists, and I thought that he could carry the deal through, but Mr. Jarnagin was very much opposed to extending the option to Mr. Robinson. He didn't seem to like him through some transaction or something, he didn't take to him, and

he thought that they could sell the property right along, and they wouldn't give him the option for six months.

Q. How did Colonel Robinson learn of the extension of your mortgage?

A. Through my father-in-law, who lives at Elmira, next door neighbor to him. I told him I had written or seen my father-in-law, he was stopping at my house, and I told him that Robinson had an option on this property, and I asked my father-in-law if he thought that he was a man who could carry through the proposition, and he said he could, that he was a man of great persistence and he was a man who could carry through a proposition of that kind if any one could, and I told Robinson that my father-in-law knew of the existence of this deed of trust, and I told him that I wanted to see him sell the land and if there was anything I could do, why I was willing to do it. When this option ran out, Colonel Robinson had my father-in-law write to me. He was very busy on some large law suit that he had on at the time and asked him if he would come down and see me on this matter, and he said that if I could get the extension on this option for six months, and he could carry through the proposition, that probably there would be good money in it for me. And I went to Elmira and saw Colonel Robinson and talked with him about the matter; told him that I had the deed of trust on this half interest and that I would write to Mr. Jarnigan and my brother and see if I could not get the date of that option extended for six months as he wanted it. He claimed the sale was to be made; that there was some English capitalist that he was looking it up for and that it would take about that time for them to get here with their engineers and examine the property and close the deal up.

Q. Who is Mr. Miller who was interested with you in the purchase of this property, and state your first communications or connections with him in regard to it?

A. Mr. Miller lives in Corning, N. Y. He is in the coal business in Pennsylvania. About the very last days of March, a year
197 ago last March. Mr. Miller came into my office, introduced himself to me, told me who he was and said that he had heard a friend of his in New York talk about a coal mine that I controlled in Tennessee, and that he had it represented to him as a good piece of property, and that he would like to buy the property if it developed what had been represented to him, and wanted to know if I had complete control of the property. I stated to him what my connection with the property was, and he wanted to know if I could get complete control of that property, so that he could go and examine it.

I told him that I thought I could. I would write to Chattanooga and I thought that Mr. Jarnigan would give me control of the property for the time, and he said that if I could, he would go and investigate the property, and I told him that I had a very good opinion of the property from what I heard, although I had never been on the property and I didn't know but I would like an interest in it myself. It had been said that he would buy it in connection with me, or we would organize a company or buy it outright if the prop-

erty was all right; and that he would go home to Corning, and if I could make such an arrangement in Chattanooga so that I had complete control—that he knew me, and he says, although you don't know me, I know you, and I want you to have complete control of the property before I spend any time looking at it. He had been looking at several pieces of property in the South, and when he had examined them they were no good; he said that he didn't have any time to spend on looking up any property there unless he knew someone that had control of it.

Q. Had he heard before he came to you of the existence of your mortgage?

A. I don't suppose that he knew in regard to the mortgage, but he said he understood that I controlled the property, on what ground, I couldn't say.

Q. Was anything done by you and him at any time, if not, say why?

A. There was nothing done at that time. He went back home and made arrangements with his business matters, and when he could get an engineer he was to go and examine the property and I was to go with him. Two or three days after, I was taken sick and had an operation and I knew nothing of business or nothing outside of my room and no one was allowed in my room but the physicians and nurses, and it was several weeks before I knew
198 anything about it. Letters came here from Mr. Miller, and Mr. Robinson here opened the letters and saw the nature of them and went to Corning and saw Mr. Miller and told him the condition that I was in and that I wouldn't be able to go and look at the property with him until I got well, and he thought that I would probably recover; and Mr. Miller said, very well, we will defer it until I got so that I could go. In the meantime, shortly afterwards, Mr. Miller's wife died, I understood, and I didn't hear anything more from him until fall.

Q. And from that beginning between you and him resulted in your taking the option in November, 1902?

A. Yes, sir.

Q. Were you in Chattanooga after the time you took the option at any other time up to the time the sale was closed, if so, when?

A. I was in Chattanooga when we took the option—forepart of November; I was again there in February, and I was there again in May—forepart of May.

Q. What was your business there on these different occasions?

A. I went down in February with Mr. Sisson. I was trying to interest Mr. Sisson in the property, and I went down with him. My brother met us in Rockwood to show him the property. I wasn't able to go over the property, and my brother went over the property with him. I went down to Chattanooga and stayed there until they had gone over the property.

Q. On which visit was this that you speak of?

A. In February.

Q. What was the occasion of the other visits?

A. They were when Mr. Miller, Mr. Robinson, Mr. Ferguson and

myself went down there. We went down to see what arrangement could be made with the railroad company, and we went over the property and went down to Chattanooga at that time and stayed over Sunday.

Q. Please state now whether between the time of the execution of this deed of trust in September, 1897, and the purchase of this land in May or June, 1903, you had received any communications from your brother or any information from him so as it changed your opinion of his financial condition as he had made it to you on the date first stated or about that time?

A. Nothing particular. I never had received any statement from him showing that his financial condition wasn't equally as
199 good as it had been, but I suggested to him that I didn't think he was making any money in the store and he said that he hadn't capital enough to make any money in the store, and I told him that he better close up, and he said no, as soon as he sold his coal lands there and some of his other property he would have plenty of capital. He claimed that he never lost any money, that most of the time he had made some; that his taxes and expenses were pretty heavy, carrying so much property, and that it was taking all that he made in the store to pay expenses.

Q. About when was that conversation?

A. When I was there in the Fall.

Q. The time you took the option?

A. Yes. I never had been in Chattanooga from '99 until last Fall.

Q. I would like you to state now what was the price which you agreed to pay to him for his interest in this land, according to the terms of the option, and if it was purchased, state when and where?

A. The option was that we were to have the land for one hundred fifty thousand dollars, that is, both their interests. I tried to carry it through on that proposition. When Mr. Robinson went there the first of January, we had become satisfied that we couldn't carry it through on one hundred fifty thousand dollars, and Mr. Jarnagin made a subsequent arrangement with him to take fifty-five thousand dollars for his share of the property if we could sell it. That was the first reduction in the property since we had been down there with Mr. Miller; he went home before we did, and he wrote to me, I received the letter at Ozone, stating that with the position the railroad people took, they wanted us to pay for the entire expense of putting in a switch which was quite expensive, while here in the North the railroad companies to get the freight would be very glad to put their own switch in without any expense to the Company, that he didn't think he would care to go on with the Company unless we could get a further reduction. I was there at Ozone. Mr. Robinson telephoned on to Chattanooga. I told him he better telephone my brother at Chattanooga and tell him to meet us at Rockwood. The next morning he did so, and I told my brother that it was impossible to carry through the proposition on the terms that they had been talking about. He would have to reduce the price on his property.

He didn't want to do it. I told him that we would have to
200 give it up on selling the property to this Company, and I finally made a compromise to him that if he could get Mr. Jarnagin to reduce his amount somewhat, and that if he would take ten thousand off his end, I would try to do something in the way of reducing the amount that I was to get out of the property and would try and carry the proposition through. I finally told him that this Company that we were organizing for this purpose, that if he could carry through the proposition and get Mr. Jarnagin to reduce ten thousand and give Mr. Jarnagin two hundred shares of the capital stock of the new Company in lieu of the ten thousand reduction, that I would go on to Corning that afternoon and see Mr. Miller and see if we could get him to stand by the proposition and carry it through.

He said he would go back and see Mr. Jarnagin and see what he could do. We went to Corning, and saw Mr. Miller and he said that on that proposition he would stand by us and do what he agreed to do, and we wrote a letter to my brother stating what we would do, and I received a telegram worded: "Mr. Jarnagin accepts proposition $45,000, and I will accept proposition as talked in Rockwood." I telegraphed back to have his deeds made out and come on with the deed, which he did.

Q. Have you got the written communications or telegrams that passed between you and your brother?

A. I have not.

Q. What became of them?

A. I suppose they were thrown away.

Q. Have you made an examination for them?

A. I haven't lately, I will look for them; I may be able to find them later.

Q. If you can find any of the telegrams or letters relating to that matter, will you file them as exhibits to this?

A. Yes, sir.

Q. When did your brother come on and close the deal here with you?

A. Last of May.

Q. If any controversy or anything in the nature of a disagreement took place between you and your brother in regard to the price when here, state in regard to what it was?

A. My brother stated that he supposed he was to get seventy-five thousand. I told him that from the talk what we had in Rockwood and from that letter that I had written him, I couldn't see how he could expect any such proposition, and that I couldn't carry
201 the project through on any other basis other than what we talked about.

Q. State whether or not he finally agreed to accept?

A. Yes, sir, I had the stock made out to him and paid him the money on that basis.

Q. Do you remember the amount that was retained by you out of the purchase price on account of debts due to you and the amount that was paid to settle endorsements of yours in the bank here?

A. Between forty-three and forty-four thousand dollars.

Q. Have you examined a statement of the same filed by I. B. Merriam in the bankruptcy proceeding?

A. Yes, it covers it.

Q. Do you remember about the amount of your individual indebtedness?

A. Between twenty-three and twenty-four thousand dollars, notes that I held in the safe.

Q. And the balance was what?

A. Between nineteen and twenty thousand dollars in the Merchants Bank. I went over and paid them and gave him the notes.

Q. That is you retained the amount of your individual debt?

A. Yes, sir.

Q. And then went and took up the other notes and gave him those notes?

A. Yes, gave him the thirty-five thousand dollar trust deed notes.

Q. Were the notes that you surrendered to him at that time the notes for which this thirty-five thousand and deed of trust stood as security?

A. Yes, sir.

Q. I will ask you to state whether or not Mr. Merriam at that time there were any debts at Chattanooga upon which you were endorser and if you had an account of those endorsements or knew what they were—the extent of them?

A. I knew that there were some there, and just how much they were I didn't know.

Q. Did you know any of them?

A. I knew there was one of ten thousand that I had endorsed, a note in the First National Bank there, to be held as collateral for paper which he discounted at that bank.

202 Q. I will get you to state whether or not at the time this real estate deal was closed and the purchase price paid, you knew of the existence of any other indebtedness except that due you that was owing to your brother; if so, what indebtedness it was?

A. Why there was some property in this tract that was to be in our purchase and represented to us as belonging to Merriam and Jarnagin, and in looking it up we found that Mr. Wright of Rockwood owned this property, and they bought this property of him and paid him $10,600, and then my brother told me that they gave a deed of trust to some bank in Chattanooga for $4000 on this property; that I think I learned when I was there in the winter one time. It was the first time that I knew that there was any deed of trust on the property, except the one that I held, and they had given a deed of trust to some bank for four thousand dollars some time before and he would have to pay one half of that, and Mr. Jarnagin one half, and I talked it over with Mr. Jarnagin and he said if they made the sale of the land the title was to be made clear for the amount they were agreed upon. There was ten thousand six hundred and four thousand, fourteen thousand six hundred as I understood it, one half to be paid by Mr. Jarnagin and one half by my brother.

Q. Did you at that time know of any other debts that he owed except the ones due to you or the debts endorsed by you?

A. At what time?

Q. The time this real estate deal was closed and the purchase money paid over?

A. Yes, he said he owed Mrs. Vann a small amount.

Q. Now, have you had any settlement with him in settling up the purchase price in regard to his indebtedness and what it was necessary for him to receive out of the sale. Please state fully what it was?

A. At that time when the settlement was made, my brother after we got the thing figured up he said it figured up a little more than he expected and he had not figured on any debts or anything of that kind and he wasn't going to have enough money to pay off all his debts out of this $65,000, and he wanted me to extend more credit for $10,000 and take the stock as collateral security for the ten thousand. I told him that I didn't want to do that and that I had put so much money into property and I was taking so much stock in this company that I didn't want to do it, but he said he
203 was afraid he wouldn't have enough to pay up his debts in his business unless I did it. I said if that was the case, I hadn't any ready money, how would we carry it. He said that Mr. Montague would be perfectly willing to carry five thousand for him; he is the President of the First National Bank, and there was a man by the name of Cate, that he didn't want the money, all he wanted was a note as security for one thousand. It seems that I was on a note for five thousand for Cate then, and there was some other party whose name I don't know that he owed $700 to and he didn't want the money and they would be glad to let him have it if I would go security for it. That made $6700. I said if you need this to go on I will go over to the bank and discount your note for $3300.00 for four months if you want to clean up everything when you get home. I said I will discount this note and get you the money, so I went over to the bank and discounted this note for thirty three hundred. I endorsed a note to the First National Bank of Chattanooga for five thousand dollars for one year. One for one thousand to Mr. Cate for one year and the seven hundred note was made for one year, making the ten thousand. He says all right, that will fix me all right and I can go home and straighten up everything, save my home and have plenty to run the business in good shape.

Q. Did he say anything about how he proposed to run his business?

A. I said, if you want to carry on your business, you ought to have more money; you ought to have from seventy-five to one hundred thousand dollars in money to carry on your business, to properly discount all your bills. He said that he had been talking with new parties and he thought he could get a good partner that would bring in good capital, and that with what he had ought to carry it on in fine shape.

Q. Now, at this time, did you know of the existence of any debts

that he then owed except the ones that he owed to you or were endorsed by you?

A. I don't know, except, as I say, he owed Mrs. Vann a small amount.

Q. Had he ever referred to the debt to the Penn Mutual Company after the time he first talked with you in 1897?

A. No, sir.

Q. Did you know what was done with the debt to the Brown Banking Company?

204 A. Yes, we talked about that, and he said he would be able to take care of Mrs. Brown all right. She is my sister.

Q. After the settlement was made between you and him, state whether or not he was satisfied or dissatisfied with the settlement from what he said or did?

A. He was perfectly satisfied and very happy.

Q. Was there anything said when he was here about his being insolvent?

A. No, sir.

Q. Was there anything said about any bankruptcy proceedings on his part?

A. No, sir.

Q. When was the first that you heard of his proceeding in bankruptcy?

A. The first I knew of it was when I received a letter from Mr. Latta of the Brown Banking Company, wanting to know if there was any way that I could take care of them on their claim against my brother who had gone into bankruptcy, voluntary bankruptcy.

Q. Do you know about when that was?

A. It was about fifteen or twenty days after he left here.

Q. Have you examined the list of debts made showing your endorsements at Chattanooga since the petition in bankruptcy was filed?

A. I looked over some today, the first I had seen.

Q. Did you know that those debts were still unpaid?

A. Not all of them.

Q. After retaining the amount due you and paying the amount due the bank here, was the balance of the cash purchase price paid to him?

A. Yes, sir.

Q. State whether or not you said to him at the time you paid that money over to him that if he didn't agree when he went home to pay the debts upon which you are endorser that you would send Mr. Robinson down to pay those debts?

A. No, sir; I never had any such conversation. The only conversation I had in regard to the disposition of this money was that there was to be a renewal note for Mr. Cate, and a renewal note for the seven hundred and the five thousand I had given to the First National Bank, and he was to take up the ten thousand note, if he used this. He said that was all right, he had plenty to do it

205 with with the thirty-three hundred that I gave him, and he would take up that ten thousand dollar note and use this five thousand.

Q. The understanding then was when you paid him the balance due him and executed these new notes, that it would take care of all his liabilities.

A. Everything.

Q. I will ask you to state whether or not, at that time or any other time prior to that, you knew that your brother was insolvent or had any knowledge that would indicate that he was?

A. I never had, no, sir.

Q. Had you any knowledge or any intimation prior to the time that you heard from Mr. Latta about the bankruptcy proceedings that your brother would be unable to pay all of his debts?

A. No, sir; I had not.

Q. I will ask you whether or not, prior to this time, it was your belief or information that you were practically the sole creditor that your brother had?

A. I supposed that he owed no large amount of money except what he owed me and the Brown Banking Company.

Q. State whether or not, during any of that time, you had any information at all of the existence of any other debts except the ones that you had named during the previous examinations?

A. No, sir; I knew nothing of his private debts, only what I was security on.

Cross-examined by ROBERT PRITCHARD and Mr. GEORGE D. LANCASTER:

Q. Mr. Merriam, before the deal of the mountain land had been consummated and when you were in Chattanooga, did you take up any notes upon which you were security for your brother at the Chattanooga National Bank?

A. No, sir; I never took up any notes there.

Q. When you came to Chattanooga, were you requested to take up any such notes?

A. Not that I know of.

Q. How soon after you left Chattanooga was it that you took up those notes?

A. I couldn't say how soon it was; there was some notes
206 there that my brother drew on me for, I think, and I paid the drafts.

Q. You were merely security on those notes, accommodation endorser?

A. Yes, same as I was on the others.

Q. Why didn't your brother take them up?

A. I can't tell you, sir. He did take them up, I suppose, he got the money of me and took them up.

Q. And why didn't he furnish the money and take them up himself?

A. I don't know, sir. I presume he didn't have it.

Q. What was the amount of the notes taken up in that way by your furnishing the money for the Chattanooga National Bank?

A. I don't know.

Q. How often, from the time you began to loan money to your brother, did he draw on you or otherwise call on you for money?

A. Sometimes he called on me quite often and others he didn't.
Q. You couldn't begin to give the number of times?
A. I couldn't tell you, no, sir. I have no record of it.
Q. Have you the letters which he wrote you asking for additional accommodations and endorsements and loans?
A. Why, I presume I have some.
Q. Will you produce them for examination?
A. Yes, sir.
Q. During the periods which you have mentioned since your brother has been a borrower from you and since you have been an endorser for him, has he at any time diminished the amount of his indebtedness to you?
A. I don't think he has, no, sir.
Q. Has the amount of that indebtedness constantly increased?
A. Yes, sir.
Q. Has he at any time paid any interest to you on the loans which you made him?
A. No, sir.
Q. As a matter of fact, in his transactions with his own local banking institutions he would, before he could get accommodation at home, have to have your endorsement, would he not?
A. He did have it on quite an amount of paper, I don't know how much he had without it
Q. You know in many instances that he had your endorsement?
207 A. Yes, sir.
Q. And how many accommodations he got without your endorsement, you don't know?
A. No, sir.
Q. You didn't inquire?
A. No, sir.
Q. Do you know the fact to be that it was impossible for him to get accommodation even to the extension of paper at his own local banks without your endorsement?
A. No, sir.
Q. Is it not a fact that the president of the First National Bank of Chattanooga, to whom you have above referred, would decline to extend any accommodation without your endorsement, and is it not a fact that before your brother, I. B. Merriam, could get accommodation at his own banks, he would have to get your endorsement?
A. I don't know, sir.
Q. Is it not a fact that it was necessary for him not only to draw upon you, but to have returns from the drafts before he could get accommodation at his home bank?
A. I don't know, sir.
Q. But you know that his drafts upon you for payment of discount and the like were frequent?
A. I know he drew on me frequently, yes, sir.
Q. Have you in your possession the drafts drawn on you and paid by you?
A. No, sir.

Q. What has become of them?

A. Those that were paid by him were destroyed; those that were not, I turned over to him.

Q. When the deal was concluded, you endorsed and discounted a note for thirty-three hundred?

A. Yes, sir.

Q. How much cash did it yield?

A. Thirty-three hundred.

Q. You also endorsed a note for five thousand, to be used according to your instructions to your brother in taking up the ten thousand note which you had previously endorsed to secure the bank on discounts your brother might make there?

A. Yes, sir.

Q. You also endorsed a note for one thousand to be used with Mr. Cate?

A. Yes, sir.

Q. And a note for seven hundred to be used with other —.

208 A. Yes, sir.

Q. Did this represent everything your brother got except the settlement of the debts due you?

A. No, sir.

Q. What else did he get?

A. He got cash.

Q. How much?

A. About twenty-two thousand, a little less.

Q. How was that cash or any part of it raised by him from you—how secured?

A. The selling of this land.

Q. You mean the land and the stock, do you?

A. Yes, sir.

Q. How much did the stock raise?

A. I let him have the ten thousand of the stock that I have enumerated.

Q. And when you say he got twenty-two thousand about, you mean in addition to the thirty-three hundred?

A. Yes, sir.

Q. Your note to the First National Bank of Chattanooga had been exhausted and had become obsolete by discounts to that extent?

A. I don't know; it may have been and it may not have been, I couldn't say.

Q. And you do not yet know how that fact is?

A. No, sir.

Q. You say that you didn't tell your brother that unless he used the money you turned over to him to discharge liabilities upon which you were endorser, you would send Mr. Robinson down?

A. No, sir; I did not.

Q. Did you give your brother any instructions upon this subject?

A. No, sir; excepting, as I said, this five thousand note was to be used in the place of the ten thousand.

Q. And you left him entirely free to use the money as he pleased?

A. Yes, sir.

Q. His statement, if he has made any such statement, that he used the money according to your instructions in taking up paper on which you were endorser, in preference to any other liabilities, is an incorrect statement?

A. Yes, if he made any such statement as that.

Q. You say with the exception of the debts which you have mentioned in your examination in chief, that you did not know
209 of any indebtedness on the part of your brother at the time of the transaction, the amount, or later. I ask you now to state if you did not know of the existence of the Brown debt?

A. I have stated that I did know of it.

Q. I will ask you to state if you did not know that he had previously been in partnership with a man named Story and had bought him out on credit?

A. I knew he had been in partnership with a man by the name of Story and had bought him out.

Q. Did you not know that he had borrowed the five thousand represented by the debt which you call the Brown debt to pay Story part of the purchase price when he bought him out?

A. I understood that was what he borrowed it for.

Q. How did you suppose, or believe or have any information that the balance of the amount of the purchase price due Story was paid?

A. I understood that he had given notes for a portion of it and that it had been paid.

Q. How and when did you understand that the debt to Story had been discharged by your brother?

A. I endorsed some paper for parties in Newark, New Jersey, two twenty-five hundred dollar notes, to pay as I understood Story with. Afterwards I loaned my brother the money to take up those notes with. In fact I sent a New York draft to one of the parties to pay one of the notes at his request.

Q. According to your statements, (I am not quoting, but state substantially what you have testified to in your examination in chief,) your brother at the time he bought Story out had a large business, solvent to the extent of some eighty thousand dollars or thereabouts and when he bought Story out borrowed five thousand from Brown with which to pay Story and you endorsed two notes for twenty-five hundred dollars, one to some New Jersey party and subsequently yourself, paid directly the New Jersey parties this money?

A. I let my brother have the money to pay one of them, I sent the note direct myself.

Q. Well, I will correct my statement then by saying that you paid one of them direct and sent your brother a draft with which to pay the other?

A. That is my recollection.

Q. Now, what I wish to ask you is this, how you could
210 believe, and what grounds or reasons had you for believing that these two twenty-five hundred dollar notes aggregating five thousand dollars could have discharged the debt to Story?

A. I don't know how much the debt was to Story. I never knew.

Q. But I am taking your estimate, or rather estimate by what you state as to the value of the business in which Story was a partner with your brother?

A. He wasn't at that time.

Q. Then I correct my statement as to Story being a partner with your brother. How could you believe that these two other twenty-five hundred dollar items which had to be paid direct to the New Jersey parties and which your brother had not been able to pay could have discharged the Story debt?

A. Why I don't know anything about it. He may have had money enough to pay them himself.

Q. Then to recur to the original proposition, you had in point of fact no reason whatever for believing the Story debt had been paid, had you?

A. I had no reason for believing it had not been paid.

Q. Do you mean to say that the fact that your brother was a continuous and persistent borrower of money from you, a man who not only did not reduce but who constantly increased his indebtedness to you, did not indicate to your mind the probability that the Story debt had not been paid?

A. He never had borrowed a large amount of money until he bought Story out.

Q. Certainly and for that very reason the more improbable that the Story debt should have been paid. Why did you think the Story debt had been paid?

A. It was none of my business. He bought goods in the store. I wasn't keeping his books. I had no reason to believe he had not been paid.

Q. You knew at the time of this conversation with your brother in 1897 that the store was encumbered to the extent of ten thousand dollars loaned by some Insurance Company?

A. He told me the real estate was encumbered for ten thousand dollars.

Q. Did you not know that his residence was encumbered to the extent of its value?

A. I did not.

211 Q. When did you first ascertain that your brother's home was encumbered?

A. I couldn't say.

Q. About how long ago was it that you found it out?

A. I couldn't say.

Q. But you have known it for several years?

A. No, I have not for several years.

Q. Have you known it a year?

A. My impression is when I was down there last Fall that I was told there was a mortgage on the place, but how much it was I don't know.

Q. You didn't inquire?

A. Not that I know of. I have no recollection of it.

Q. And you knew that your brother had become in such condi-

tion that it was necessary to mortgage or at any rate that he had mortgaged the mountain land for four thousand dollars?

A. I found out last Fall that he or Mr. Jarnagin had. He had to mortgage his share for it, it seems.

Q. Did you in 1897 know how much the mercantile indebtedness of your brother was?

A. In the Spring of 1897, yes. In February, 1897, I was told it was very light. They paid cash for their goods; they claimed that they had no large amount of indebtedness, paying cash for their goods.

Q. You were in the store at that time?

A. In 1897, yes.

Q. And the next time you were there was 1899, the year you say the army had been in camp at Chattanooga?

A. I think it was.

Q. In the meantime or some time in the Fall of 1897 you took the deed of trust on the mountain land?

A. Yes, sir.

Q. Who suggested the execution of the deed of trust?

A. I did, or a mortgage, a trust deed is equivalent to a mortgage. I suggested when I was there in the Spring and he said he would give it any time I wanted it.

Q. You suggested the deed yourself, and the deed of trust or mortgage was executed in compliance with your request?

A. Yes, sir.

Q. At that time the amount of indebtedness was represented by about thirty-five thousand dollars note and that thirty-five thousand dollar note represented various items which existed in the way of endorsements, etc., which you say were liable to change?

212 A. Some were loans and some endorsements.

Q. Well, the amount thirty-five thousand was ascertained by actual calculations of the various items of endorsements, etc., they figured up a little more, but the amount was actually calculated?

A. Yes, sir.

Q. And was ascertained in 1897 to exceed thirty-five thousand dollars?

A. Yes, sir.

Q. How much have you loaned or become liable for since 1897?

A. Well sir, I couldn't tell you how much it was, but I took the interest and all of the notes, I should think it was fifteen to twenty thousand more, take interest and all; there has been accumulating interest all the while.

Q. Can you give me list of the new liabilities incurred either directly or indirectly for surety for your brother since the execution of the thirty-five thousand note?

A. I couldn't just now.

Q. Well, take the thirty-five thousand as starting point, and I will ask you to prepare and file as an exhibit No. 1 of this cross-examination, a list of all liabilities incurred by you on account of your brother since the execution of that thirty-five thousand dollar note. Will you do so?

A. I will endeavor to. Some of these endorsements I haven't kept a record of.

Q. Please then make the list as full and as accurate as possible and file the list as Exhibit 1 of this cross-examination?

A. No answer.

Q. You discussed the propriety of putting on record the mortgage or deed of trust?

A. Yes, sir.

Q. And your brother was requested to see a lawyer and get his advice?

A. I told my nephew to do that, sir.

Q. Your nephew then, he was requested to see a lawyer and get his advice?

A. Yes, sir.

Q. And he did report to you that he had seen a lawyer and had been advised that it was not necessary to record the mortgage?

A. He did.

Q. Did he tell you whom he saw?

A. No, sir.

213 Q. The nephew to whom you refer is Mr. Thomas N. Merriam?

A. Yes, sir. I think it was a lawyer at Crossville. He said he was a good lawyer.

Q. When did you first see this deed of trust and where?

A. Why, the trust note was sent me at once and I saw the trust deed when I went to Chattanooga in 1899, April.

Q. Who had it and what was the occasion of its exhibition to you?

A. I wanted to see it and look it over and I spoke to Tom about it and he said it was down in the safe and they went down to the office and took it out the safe and I looked it over and handed it back to him.

Q. Did you see him take it out of the safe?

A. I think he asked his brother Frank to take it out. He had the combination.

Q. But you saw them take it out of the safe?

A. Yes, sir.

Q. Is it not a fact that it never was in the safe but was kept by Thomas N. Merriam in his trunk at his father's residence?

A. At the time I saw it, it was taken out of the safe.

Q. Did you see it after that?

A. No, sir, not after I handed it back to Thomas N. Merriam.

Q. The objection to recording the deed which your brother made was two-fold, one that it might injure the sale of the property and the other that Mr. Jarnagin might object?

A. Yes, sir.

Q. There was at that time a deed of trust on the property, was there not, for four thousand dollars in favor of the Chattanooga Savings Bank?

A. Not to my knowledge. I didn't know there was another deed of trust on the property until afterwards.

Q. When did you learn that there was a four thousand incumbrance on the property in favor of the Chattanooga Savings Bank?

A. Last fall or November, I think it was.

Q. In April, 1899, when you were in Chattanooga, you were there at your brother's store and house, were you not?

A. I was down at the store once.

Q. And you talked with your brother about his financial condition?

A. I did, yes.

214 Q. Did you talk with anybody else about his financial condition, anybody outside?

A. Not that I know of.

Q. Anybody inside or anybody else?

A. No one but him and his son. I don't recollect of any one else.

Q. With which of his sons did you confer about your brother's financial condition?

A. Frank. We talked over their business and how they were getting along.

Q. You were informed that they had made some money the year before—1898?

A. That is what they told me.

Q. Did they tell you that they had made any more money than was necessary to pay expenses?

A. No, but they told me they were making some money and I inferred they were making more than expenses.

Q. They didn't pay you anything on their indebtedness, did they?

A. I didn't ask for anything.

Q. And they didn't pay anything?

A. No, sir.

Q. They didn't claim to have made any money any other year except that which you have referred to?

A. I didn't talk with them about any other year?

Q. When was the option with Col. D. C. Robinson of Elmira taken, on your visit in 1899?

A. No, sir.

Q. About when?

A. The next fall, but I am not sure.

Q. Do you mean in the fall of 1900 or fall of '99?

A. The fall of '99, but I am not sure.

Q. The man Robinson, of Elmira, N. Y., to whom you refer was not expected to himself become a purchaser of the land, as I understand?

A. He was expected to sell it to an English Syndicate; whether he was to be a purchaser himself I don't know, but he expected some English syndicate to go into it.

Q. And Mr. Jarnagan's objections to giving Robinson an option or extension was that he didn't care to tie the property up with a man who wasn't to become a purchaser himself, but who merely hoped or expected to find a purchaser, was it not?

A. I don't know. He objected to giving the option, that's all I know about it.

215 Q. Didn't he state his objections?

A. I didn't write to him in regard to it. I wrote to my brother and he wrote back that Mr. Jarnigan didn't take any stock in Mr. Robinson. I think those were his words, and he wouldn't give the option.

Q. Mr. Miller, of Corning, N. Y., applied to you for an option on the property, stating that he understood you controlled the property?

A. He didn't ask for an option. He asked me to go with him and look over the property.

Q. Do you know how he had understood that you controlled the property?

A. He inquired from some party in New York.

Q. And, in point of fact, your efforts to sell this property were made with a view to having your debts which were secured by a mortgage on the property discharged?

A. Yes, and to help my brother.

Q. Primarily, however, I am speaking from a business point of view, your interest lay in having your debts discharged, did it not?

A. And help my brother.

Q. But your brother didn't need any help, did he?

A. Yes, I loaned him money to help him.

Q. If the property was sold, he would pay out in full?

A. Yes, sir.

Q. And your object then in trying to effect the sale of the property was to get your debt paid finally and then enable your brother, with the balance which should be left after discharging your debt, to pay his other creditors, was it not?

A. You mean this last sale?

Q. I mean all the efforts you made to sell this property, did you not have it constantly in view, to-wit, collection of your debts against your brother, and furnishing assistance to your brother by enabling him, with the balance which should be left after paying your debts, to pay his other creditors?

A. It is a little difficult to answer that yes or no.

Q. You were in Chattanooga in November, 1902, when the option was taken on the property?

A. Yes, sir.

Q. How long did you stay there then?

A. Three or four days.

Q. Did you stay at your brother's house?

A. Yes, sir.

216 Q. Were you at his store?

A. I think I was down there once. It was Sunday night I walked in there.

Q. You were there in February, 1903?

A. Yes, sir.

Q. How long did you stay there then?

A. I think it was from Thursday night until the next Monday night, to my recollection.

Q. Were you at his house and store then?

A. I was at the house. I don't remember being at the store.
Q. You were also there in May, 1903?
A. Yes, sir.
Q. How long did you stay there then?
A. I think I came down Saturday night and went back to Richmond again Tuesday morning.
Q. Were you at his house and at the store on the occasion of this visit?
A. I think I was. I went down to the store once. I was at the house.
Q. The store was a large building, wasn't it?
A. Yes, a good sized building.
Q. Were there any customers there?
A. One or two. I was only in there a few minutes.
Q. Did you see any goods in the store?
A. Yes, sir.
Q. About how much of a stock?
A. I couldn't tell you, there was a lot of goods piled up on the first floor; I didn't go upstairs.
Q. You are a man of business affairs, I will ask you to state whether it wasn't obvious to the most casual observer that there was no stock of goods in that store upon the basis of which any sort of wholesale business could be conducted, and whether it wasn't also obvious to the most casual observer that the firm of Merriam & Son were doing practically no business at all?
A. I wasn't there long enough to be a judge. I would say that for carrying on a wholesale business here in the north it was a pretty light stock of goods, but how much business they did I had no knowledge.
Q. Did you observe what office force he employed?
A. His son kept the books, I believe.
Q. Any other employés in the office?
A. I don't know that there were any others in the office.
217 Q. Did you see any salesmen standing around the floor?
A. His sons were selling goods on the road, my brother was tending to the store sales and I think they had some darkey porter that was doing the porter work. I was only there a few moments.
Q. Assuming that the stock of goods that he had at the time you were there in November, February and May was worth some twelve or fifteen hundred dollars, and that these goods were in that large store, do you think you would have noticed the smallness of the stock?
A. Why, I should have said it was a pretty small stock, yes, if there wasn't more than that in there.
Q. Did you know, as a matter of fact, when you came to Chattanooga upon those three visits that your brother was doing practically no business at all as a wholesale grocer?
A. I did not.
Q. Did you think he was doing a good business?
A. I didn't know anything about it.

Q. You didn't inquire, did you?

A. I asked them what business they were doing, and they said they were not do-ng a very large business, that is all I know about it. They kept two travelling men.

Q. Did you ask your brother whether he was making both ends meet in his business?

A. No, sir.

Q. Did you ask your brother if he was making or losing money?

A. I asked if he was making money. He said he wasn't making much, business had not been very good the last year.

Q. Did you ask him concerning his commercial indebtedness?

A. No, sir.

Q. Did you ask him concerning the debt due to the Penn Mutual Insurance Company?

A. No, sir.

Q. Did you ask him concerning the Mistress Vann debt of some five thousand dollars?

A. No, sir.

Q. You had recently before ascertained that he had a mortgage on his house, did you ask him the amount of that mortgage?

A. No, sir.

218 Q. You knew that he had not paid the bank anything, and you knew that he had paid you nothing?

A. I supposed he had paid the bank something.

Q. But you knew that he had paid nothing except on your own endorsements, and you knew that his payments did not reduce the amount of his indebtedness?

A. I did not.

Q. You had endorsed for him at a bank in Syracuse, N. Y.?

A. Yes, sir.

Q. What was the extent of those endorsements?

A. About between nineteen and twenty thousand dollars.

Q. And the Syracuse Bank made the loan exclusively on your credit?

A. Why they had made the loan, I don't know whether it was exclusively on my credit. I told the president of the banking company that I had a deed of trust on this property and that I loaned this money to my brother. My name was good at the bank.

Q. But wasn't the debt owed to the Syracuse bank made after the execution of the mortgage?

A. Not all of it.

Q. What proportion of the indebtedness to the Syracuse bank was incurred after the mortgage had been executed?

A. Somewhere about ten thousand dollars after the mortgage was executed.

Q. Then something like ten thousand dollars to the Syracuse bank was contracted prior to the mortgage and something like ten thousand dollars subsequent to the mortgage?

A. Yes, that is my recollection of it now.

Q. And why was it that you told the president of the bank that you had the mortgage and that his debt could be secured thereby?

A. I didn't tell him that his debt could be secured thereby. That was three or four years ago I told him the president of the bank. He wanted to know who I. B. Merriam was and I said it was my brother, and he says, I see you are using quite a little of his paper here, and I said yes, I am discounting his paper here, and he said, "Are you secured on it?" and I said "Yes, I have a deed of trust on certain of his property in Tennessee."

Q. So the statement you made to the President of the
219 Bank to the effect that you held a deed of trust was in answer to the inquiry of the President whether or not you were secured in your endorsements?

A. Yes, he was a friend of mine.

Q. So that at least the banks' loans to your brother secured by your endorsements were made exclusively on your liability?

A. Yes, sir.

Q. The Mr. Robinson to whom you refer is your partner or concerned with you in business, is he not?

A. He is the Secretary of the Penn Spring Works and I am President of it. It is a stock corporation. That is the only business we have together.

Q. And he is the Mr. Robinson to whom you refer as being unwilling to go on with the deal unless Mr. Jarnagin would reduce the amount he was to receive therefor?

A. Yes, sir.

Q. Was there at that time anything said to Mr. Jarnagin to the effect that a deal was pending whereby he would receive a less sum from the sale of the lands than Mr. Merriam would receive?

A. I don't know, sir, whether there was or not.

Q. When you say Mr. Jarnagin was asked to reduce the amount which he was to receive, do you mean to say that it was put to Mr. Jarnagin in that way and that he was asked to reduce the amount that he was to receive as his share of the proceeds of the sale of the lands?

A. I wasn't there, I couldn't say. Mr. Robinson did that business.

Q. But did you not make it appear that you concurred with Mr. Robinson in making the reduced offer for the lands and was not the reduced offer a reduced offer in gross for the whole of the lands?

A. I never made any reduced offer to Mr. Jarnagin, the settlement that I had was with my brother at Rockwood in regard to the purchasing of the land. My brother thought he didn't want to take less than seventy-five thousand for his share of the land. He said Mr. Jarnagin was very anxious to sell, perhaps he would reduce some on his part. I told him he could talk with him.

Q. And so you understood that the reduction was to come from Jarnagin, did you?

A. A certain amount of it.

Q. Now, Mr. Merriam, isn't it a fact that instead of it being an offer to Mr. Jarnagin to reduce it was an offer to give a less
220 price for the lands, and is it not a further fact that the fact that Mr. Jarnagin was to receive less than I. B. Merriam was concealed from Mr. Jarnagin?

A. I don't know, sir, That is a matter they did with themselves. I didn't talk it over with them.

Q. Isn't it a fact that you yourself wrote to your brother that the price of the whole lands in the aggregate would have to be reduced, that is the cash part from one hundred fifty thousand to one hundred thousand?

A. No, sir, it wasn't reduced that much.

Q. Well whatever the reduction was isn't it a fact that you wrote to your brother enclosing to him the letter you had received stating in substance that unless the price of the whole lands was reduced the deal wouldn't go through?

A. Yes, I wrote him as to the price, that unless the price was reduced we couldn't carry the deal through.

Q. Is it not a further fact that no reference was made to any reduction by Mr. Jarnagin as distinct from a reduction for the entire price of the lands?

A. No.

Q. Was any mention ever made, except secretly and privately to your brother by yourself of any reduction of the price on the part of Jarnagin as separate and distinct from a reduction on the price of the whole lands?

A. Not until the last transaction, the transaction when Mr. Jarnagin reduced the price of the land twenty thousand. Mr. Robinson was there and made the deal himself. I knew nothing about it until he got home.

Q. And you engaged in this transaction with Merriam and Jarnagin knowing the fact to be that Jarnagin believed he was receiving one half of the entire amount paid for the lands?

A. No, sir, I didn't. I understood that he knew all the time what it was to be.

Q. You say you believed that Jarnagin knew all the time what it was to be?

A. Yes, sir.

Q. From whom did you get the understanding that Jarnagin understood that I. B. Merriam was to receive one price and he another?

A. From my brother.

Q. When and where did your brother, I. B. Merriam, tell you this?

A. When I was there in February.

Q. He then stated to you that Mr. Jarnagin understood
221 that he, Jarnagin as one of the tenants in common of the land, owning a one half interest therein, should receive a less price than your brother, I. B. Merriam, the other tenant in common owning the other half interest, did he?

A. Yes, he stated his reasons why.

Q. What reasons were assigned?

A. That Mr. Jarnagin had never done any of the work, that my brother had done the work and spent a good deal of time and money in getting the openings and everything of that kind, and that Mr. Jarnagin was willing that he should get more out of the property than he did because he contended that he was entitled to it.

Q. At the time of the purchase of the lands by you, you knew that there was an indebtedness upon the land amounting to $14,600 which would have to be cleared up if you took the entire land, before yours could be paid?

A. Yes, sir.

Q. And you knew of the Brown debt?

A. Didn't know how much it was. I knew that it had been originally five thousand dollars but that some of it had been paid.

Q. Who told you that some of it had been paid?

A. My sister, Mrs. Brown and my brother told me.

Q. How much did they say had been paid?

A. I don't remember.

Q. Did they tell you where I. B. Merriam got the money with which to pay it?

A. No, sir.

Q. Did you know?

A. No, sir, I didn't know.

Q. And you then found out about the existence of the Story debt at the time the deal was closed?

A. I didn't know how the matters stood with Story.

Q. But when you were discussing about the amount of his indebtedness and his inability to pay his debts, did you ask him about the Story debt?

A. I did not. I supposed he was entirely or about paid up.

Q. You knew of the bank debts at Chattanooga and the bank debts here?

A. I knew the debts that I was endorser on; there was some in Chattanooga that were more than I supposed they were, but I knew all that there was here.

Q. And you knew that there must necessarily be some mercantile debts?

222 A. Well, I didn't think it was necessary to be; he paid cash for his goods.

Q. You knew of the Cate debt?

A. I didn't know it until this summer.

Q. But you knew it at the time he closed the deal and the settlement was made between you and your brother?

A. Yes, sir.

Q. And you knew of the Mistress Vann debt?

A. He said he owed her some small amount.

Q. You knew that small amount meant about six thousand dollars?

A. No, I didn't.

Q. You didn't inquire?

A. No, sir, I didn't know whether it was six thousand or six hundred.

Q. And while you knew that they had taken all the money with which you furnished your brother, or practically all of it, to discharge liabilities upon which you were security, you still expected the proceeds of the sale of the mountain land would clear him of indebtedness, did you not?

A. It would not take all the money to discharge those that I supposed I was liable on.

Q. It took practically all of it but between about three or four thousand, did it not?

A. No, I don't think it did.

Q. You didn't figure at all did you?

A. Why, I figured like this, that I was security for him on about fourteen or fifteen thousand dollars down there outside of the Cate debt and the seven hundred; that would make it about sixteen to seventeen thousand dollars, and that if it took seven thousand or about that to pay off Mr. Wright and the mortgage down there the trust deed to the bank in Chattanooga, that would make it about twenty-four thousand, and he took back from here in cash and endorsements amounting to about thirty-two thousand.

Q. But you knew of these various debts but didn't inquire as to the amount of them?

A. No, sir.

Q. But concluded that after paying the debts upon which you were liable, there would be enough money left to discharge all of his other debts, did you?

A. Yes, sir, I took his word for it, I supposed he knew more about his business than I did.

Q. And this conclusion was reached by you in view of
223 the fact that you had known that your brother had not reduced his indebtedness to you but had constantly increased it and had never paid you principal or interest, that the only payments of which you had information which he had made, were made by the creation of a corresponding indebtedness to you that you did not know of his having paid anybody else either principal or interest and had made no inquiries as to the extent of the incumberances upon his property, and didn't know of his having sold any other property except the mountain land he was then selling to you; and you knew that his business had not been profitable, was it not?

A. I didn't know that his business had not been profitable; I did know that he had sold some other property. I supposed that by his borrowing the money from me that he had paid all his other obligations, it was so represented to me that that was what he used this money that he had borrowed from me for, to pay his other liabilities; that is what I supposed he did with the money; that he didn't owe anything.

Q. But the principal debts which made I. B. Merriam a bankrupt had not been paid, and according to your previous statements he had not represented them to you as having been paid?

A. I didn't know that he owed them.

Q. You knew that he owed a debt on his home, also you knew that he owed a debt to the Penn Mutual Life; you knew that he owed some balance to Story?

A. No, I didn't.

Q. You knew that he owed mercantile debts?

A. No, I did not.

Q. You knew that he owed bank debts? You knew that he owed

the Vann debt; you knew that he owed the Cate debt; you had never inquired whether they had been paid or not, and he had never told you that he had paid them, how did you suppose he would be able to pay them with this small amount of money that he had received?

A. I did not know that he had not paid them to commence with.

Q. You merely supposed, in view of the facts which indicated his absolute insolvency and the inability to pay his debts, that he was solvent and would pay?

A. Yes, I supposed he was solvent and would pay all his debts. I knew that he was a man of very good habits and character
224 and I didn't know that he was speculating and I supposed that the amount of money that I loaned him would enable him to pay everything. That is the facts of the case.

Q. Then if you supposed that he had paid all of his debts, as you state, why was it necessary for him to raise five thousand more from Montague on your security?

A. Because he owed this certain amount there that I was endorser on and had to take up that and pay this small indebtedness that he owed here would require that much more money.

Q. He told you that he thought that Mr. Montague would carry him for five thousand on your endorsement?

A. Yes, sir.

Q. And that with that five thousand so carried he hoped to be able to save his home?

A. Yes, and his business—money to carry on his business. He claimed that he had a large amount of property in Chattanooga and that Chattanooga property was doing well; he sold at lot while I was there; and he thought he would be able to sell a large amount of property he had there this spring and that it would put him in nice shape. I supposed he would have a good large amount of property left.

Q. How did you construe his hopeful expectation of saving his home by the aid of the five thousand dollars?

A. It wasn't to save his home; it was to take care of the other note that was already in the bank.

Q. But you stated, did you not, that he said he would be able to save his home?

A. He said he would be able to save his home and have plenty of money to carry on his business; that was when we discussed the grocery business. I told him it took a very large amount of money in this part of the country to carry on a wholesale grocery business. He said it didn't require that much money there.

Q. Did he say how much it would require?

A. No, sir.

Q. But you advised him to close up his business unless he could get seventy-five or one hundred thousand dollars?

A. Unless he had that much money to put into it; that he was getting to be an old man and that I wouldn't undertake to carry on such a business on a small capital; that he would have enough to live on without it if he sold off his real estate.

Q. You said you didn't care to advance any more money
225 because you had already put so much money into the purchase of this property?

A. Yes, and that my health was poor. I didn't want to have any more burdens.

Q. When you refer to money that you had put into this property, you mean money which you had previously loaned your brother and which was repaid by the sale of this property?

A. Money that I had paid to the bank here and a lot more.

Q. All of which you got back out of this property?

A. Not a dollar of it, and perhaps never will. That is a question of time and diligence to show what we will get out of it.

Q. Why were you so particular to get back the money out of the sale of this property?

A. I didn't get it back. I got it in the property. Organized a stock company and I took some of the bonds and stock.

Q. But you knew your brother was very anxious to get some more money, and in fact you endorsed for him to the extent of thirty-three hundred after his consultation. Now, if you knew that your brother was anxious to get money, and if you were so thoroughly satisfied of his solvency, why were you so careful to deduct the amount of his indebtedness to you from the price of the property?

A. Why, I put the money into the property to carry the deal through, and more too.

Q. But why were you not willing to let your debts against your brother run on?

A. I didn't think it was necessary. I supposed he got enough for his land so that he would not have to let his own debts run on.

Q. And you say that whether you get your money back out of the property is one of the uncertain things to be decided?

A. Yes, I do.

Q. And you don't consider that you have got your money back from the property?

A. No, sir, I do not.

Q. It is a business venture?

A. Yes, if the property proves good and we don't have too many railroads to deal with, why we will get something out of it.

Q. You say that you are a man sixty years of age and in ill health?

226 A. Yes, sir.

Q. You had your money loaned to a man abundantly solvent, according to your own statement, and why would you be willing to enter upon a new and untried venture instead of letting your money remain as it was?

A. I didn't get into an untried new venture. I was in, and I had to form a company to work out. That is, we had this land and my security was on this land for my large claim. The land was lying there idle. I became satisfied that Mr. Jarnigan and I. B. Merriam were not the men that could keep it. I took hold of the property to get men of experience in that line of business and of sufficient capital to develop the property and put in on a paying basis if possible.

Whether it can be put on a paying basis is like most other mining property, it depends upon how good it is when we got inside. You can't tell.

Q. In other words, although you knew that you had a good debt against a solvent man, you preferred to invest that debt on an uncertainty?

A. No, sir; my debt was against this property and against a good man and against a good piece of property, as I believed.

Q. And you were willing to release the personal liability of the good man in order to get the property and operate under an untried venture?

A. I took those chances.

Q. And the fact of I. B. Merriam's insolvency and the fact that you knew that you had no security whatever except this property and no chance of ever getting one dollar of your debt unless you took it in the property had nothing to do with it?

A. I never had any such idea. I have not sworn to anything of that kind.

Q. Did you expect him to pay you out of the eleven hundred dollar stock of goods that you saw in his store?

A. I didn't know what his stock was worth. I never took an inventory of it. I never examined it. I didn't know what his property in Chattanooga was worth. I took his representations on what he claimed to be worth and what his property was worth.

Q. Did you expect him to pay you out of his store house already encumbered to the full extent of its value—$20,000?

A. I didn't know it was encumbered for twenty thousand dollars.

227 Q. Did you expect him to pay you out of his Montgomery Ave. lots which were encumbered to the full extent of their value to secure the Vann debt?

A. I didn't know that the Vann debt was secured on those lots; didn't know that the lots were mortgaged.

Q. Did you expect him to pay you out of the house and lot in Chattanooga which was also encumbered to the full extent of its value?

A. I didn't know that it was encumbered to the full extent of its value.

Q. Did you know of any other property which he owned out of which he could pay you?

A. Nothing only what he represented himself.

Q. Did he represent himself as having any other property?

A. Yes, I have sworn to some others.

Q. But I ask you now to state if he referred to any other; if he mentioned any other specific property which he owned, to tell what property he referred to at that time?

A. Yes, I have sworn that he owned other property besides that you mentioned.

Q. What other property did he own at the time of the closing of this transaction besides that which I have mentioned above, out of

which you expected he would be able to pay you if you had not taken your debts out of the land trade?

A. I have told you that he claimed to own a good deal of property there. I have only spoken of a few pieces that I knew about.

Q. If he stated to you that he owned at the time of this deal any other property besides that which I have mentioned above, I will ask you to state where that property was situated or where he said it was?

A. I didn't say at the time this deal was closed he claimed to own any more property. Only that he owned a large amount of real estate; it wasn't specified, but I know when I was there he told me he owned a large amount of real estate.

Q. When your brother had left here, after you had deducted the entire amount of your indebtedness, you say he expressed himself as being perfectly satisfied and very happy?

A. Yes, sir.

228 Redirect examination:

Q. How long was it before this deal was closed that he had made the statement to you that his total indebtedness was about forty thousand dollars, and at the same time represented what the value of his real estate and store and business was?

A. In the Spring of 1897.

Q. And I understood you to state that at the time it was closed he made no representations to you as to what he then owned?

A. No, sir, he didn't.

Q. And that you supposed that what he owed was the debts he owed you and the debts of which you were the endorser?

A. I supposed that is so except some small debts for which I loaned him the additional amount of money to pay.

Q. Did your brother at any time after 1897 make any statement to you as to his assets and liabilities?

A. When I was there in 1899 as I have stated to-day, I asked him how they were getting along; he said all right they had made some money last year and that he thought they were doing very nicely.

Q. Was that the only conversation that you had with him about his business after 1897?

A. Yes, I didn't see him from 1899 until last Fall.

Recross examination:

Q. What is the name of that corporation or stock company with which you said you and Mr. Robinson were both connected?

A. Penn Spring Works.

Q. What connection have you with the Merriam Manufacturing Company?

A. I am President.

Q. Are you connected with any other business corporations?

A. I am president of the Empire Contracting Company. I am a director in several other institutions.

Q. Are you connected in any way with the Merchants Bank?

A. I am a director; on the discount committee.

Q. Are any of these concerns subscribers for Dun's Mercantile Agency or Bradstreets'?

229 A. I am a subscriber for Dun's; have been for Bradstreets. And the Merchants' Bank takes both of them.

Q. Have you ever been engaged in any mercantile pursuit?

A. Yes, I was in the wholesale and retail hardware business for twenty-three years.

Q. Any other?

A. No.

THOMAS MERRIAM.

Sworn to before me, a Notary Public, duly commissioned, and sworn August 25, 1903.

[NOTARY'S SEAL.] FRANK B. HODGES,
Notary Public, Owon. Co., N. Y.

W. HERBERT ROBINSON, being sworn testified as follows:

Q. Please state your age, residence and business?

A. I was born on the 25th day of August, 1863. My residence is Baldwinsville, N. Y. I am connected with the Penn Spring Works, Secretary and Treasurer.

Q. Have you had any connection with the sale of lands in the south, belonging to I. B. Merriam and Mr. Jarnagin.

—. ——.

Q. Please state what it was up to the time the deal was closed?

A. My connection with the deal dated from the month of November when Major Merriam and I left here on the evening of the fifth of November and went south; went around by Georgia and finally landed at Chattanooga. We went down to have a look at the lands, for I think we had never seen them together, and when we got to Chattanooga, it was suggested that we go up to Ozone and look over the property. We went up with his brother Ike and after having had a look at the property looked over the timber part of it. Then we came to the conclusion that probably we could form a company in the north, buy the lands and operate them.

We jointly took an option from Merriam and Jarnagin for these lands prior to our leaving Chattanooga, and we came north with the purpose of forming a company as I said to buy this property and to get sufficient capital to work it and try and make some money on it if possible.

Q. What was the price stated in the first option?

230 A. $150,000.

Q. If that price was reduced at any time afterwards, state when and why it was reduced?

A. Subsequently I went down there with some other people from the north, people that I was interesting in the deal, people that I wanted to have look over the land themselves, so that they would know what they were doing and buying, and they looked over the property and came to me and said they thought the price they were asking for the land was somewhat too high, and after hearing what they had to say on the subject I went to Mr. Merriam and Mr.

Jarnagin and I told them what the result of my deiiberations were with my friends, and it was arranged then and there between Mr. Jarnagin and us that is, Major and me, for I was buying for him at that time, that Mr. Jarnagin, would throw off a certain sum that he would be willing to take I think $55,000, I think that was it, so there was an agreement drawn up between Mr. Jarnagin and myself at that time and he agreed to take $55,000, if it was paid in cash within thirty days. I think there was something of this kind mentioned in the agreement that we had. I then went to Mr. I. B. Merriam and I asked him to do the same thing and he said it was impossible, he said he needed that amount in order to pay his debts. He says if I get that amount of money, that will pay my debts but I can't take anything else. That conversation took place in his own house in a bed room up stairs.

Q. Please state what the negotiations were if any that led to a further reduction and when and how they were brought about?

A. We had some of our friends down there again, some of the large stockholders that were interested with us at the time and who are large stockholders at the present time. They went over the matter very carefully. They spent three or four days there. They went over to Nashville to see the railroad people to see what arrangements we could make with them, and after having talked with Mr. Chapman of the Tennessee Central Railroad, and Mr. Fallhobber, of the Cumberland Coal and Coke Company, we came back to Crab Orchard, the Major and myself and our friend Mr. Miller, he had to go on home. He went home immediately after leaving us in Nashville, and we, as I say proceeded to Crab Orchard, and we looked over the western territory, that was the first time that any of us had been on that particular part of the land. We were to go
231 on to Ozone and receive a letter or wire from our friend Miller who was then in the north. We got to Ozone in the afternoon and there was a letter there from Mr. Miller, and after reading that letter, we became very much discouraged and disheartened because he said in the letter that at the price, he would be unable to complete the deal. He was sorry as he would like to have done what he could but he couldn't see his way clear to go ahead with the organization of the company or to put his money into any company that might be organized under the conditions that existed, and buy land at the price named. We immediately telephoned to Chattanooga, called up Mr. Merriam and asked him to come to Rockwood on the morning train. We said we would tal the train at Ozone the following morning and meet him at Rock wood.

We reached Rockwood about six o'clock in the morning, and Mr. I. H. Merriam came up from Chattanooga on the local which reached there about eight o'clock. When we met Mr. I. B. Merriam, the Major his brother handed him the letter received the day before from Mr. Miller, and he was very much taken back to say the least. And we, of course, were anxious to put the deal through, we had spent a lot of time and money completing our organization, and we had got our organization books completed with the exception of Mr.

Miller's name to the company, and we told Mr. I. B. Merriam of the condition that confronted us and that it would be impossible to put the deal through on the basis of the price that we were then arranging, and we suggested to him that he reduce the price, and suggested also that he see Mr. Jarnagin and see what he could do. We spoke to him about what we thought would be a fair figure and a figure that we thought probably we would be able to put the deal through at. We said to Mr. I. B. Merriam that we thought we would be able to put the thing through and Mr. Thomas Merriam suggested to his brother that we give Mr. Jarnagin forty five thousand in cash and a block of stock in our new company; and we gave to him $65,000 and a block of stock as well; and to that proposition Mr. I. Merriam readily agreed, saying that even then that he thought that he would be able to get through, but he said he thought he should have $75,000 for his interest in the land. We were doing all we possibly could to give him what money we could get for the land to help him as much as possible. We came on north from Ozone. We came
up to Corning and met Mr. Miller there, and we presented to
232 him our proposition, whereby we were going to get a reduction in the price of the land which would give us a greater working capital for the company, and to that proposition he agreed. We came home from Corning to Syracuse and we wrote a letter to Mr. I. B. Merriam in reference to the matter and telling him in the letter what the agreement was that we had entered into with him that morning at Rockwood, and saying to him in the letter that if this was not substantially correct that both he and Mr. Jarnagin would agree to it, that they would wire us at once. We got a letter from him afterwards stating that the proposition was satisfactory, but received no wire from him, and we came to the conclusion that that was all there was to it.

Q. Have you the correspondence or a copy of it, you say closed that deal?

A. No, I have not. It was written at Mr. Thomas Merriam's office and signed by Mr. Merriam and myself. No copy of it was kept. We considered it a personal matter.

Q. When you were in Chattanooga where did you stay?

A. The first time I stayed at Mr. Merriam's house; the second time I was there I stayed at that house opposite the railroad station.

Q. Reid House?

A. Yes, sir.

Q. How long had you been acquainted with Mr. Thomas Merriam?

A. About four and one half years.

Q. Had you been intimately, or not, associated with him in business.

A. I have been intimately associated with him in business for that length of time.

Q. Did Mr. I. B. Merriam understand the connection you had with him in business?

A. Yes, sir.

Q. I will ask you to state if you were present when I. B. Merriam came on to Syracuse to close the deal?

A. Well just where. I was here in Syracuse when Mr. Merriam was here.

Q. Did you hear any complaints made by him as to any misunderstanding in regard to the price that he was to receive from the land?

A. I did. I spent an evening with him at Mrs. Ernhout's house, and he told me he was very much taken back and that he
233 didn't understand it that way, that he thought he was to receive seventy five thousand. He said you know I told you when you were in Chattanooga that I had to receive $75,000 out of this land, and if I received $75,000 I would then be able to pay my debts, save my property, or words to that effect. The effect of it was that he would be able to pay his debts and save his property if he got $75,000.

Q. Where did that conversation take place?

A. At Mrs. Ernhout's house.

Q. Who is she?

A. Sister of Mr. Merriam.

Q. State whether or not he did finally agree to accept the $65,000 in cash, and the twenty thousand in stock, and if so, upon what representations his brother was induced to take the $20,000 in stock that he was to get, and advance him $10,000 more in cash?

A. The agreement that we entered into with our friends was that the land would be bought on the basis of sixty five thousand to Mr. Merriam, and the forty five thousand to Mr. Jarnagin, with the block bonuses to each. We couldn't go back on that arrangement with our friends; we had given them our word that such would be the case, and it was absolute so far as we were concerned, and Mr. I. B. Merriam, so far as I know took the sixty five thousand that he agreed to take that morning in Rockwood. I afterwards learned from Mr. Thomas Merriam that he as good as gave his brother ten thousand more before leaving for the south, in order to place him in a position to liquidate his obligations, because he said to me the night before, that if he had that he would be able to pay everything that he owed.

Q. Did you have a conversation with him in Chattanooga at the time you stopped at his house, in regard to the necessity for receiving the seventy-five thousand, and what it would enable him to do?

A. The conversation that I had with him was the one of which I have spoken, that occurred in my bed room that evening. I told him what the price was to him, and he said that he had to get that much money out of the land to enable him to pay his debts and save his property. And when he came on here we talked it over.

Q. And when he came on here he insisted on getting that price and recalled that conversation to you?

A. He recalled that conversation to me at Mrs. Ernhout's
234 house that night, saying, you remember what I told you in Chattanooga, that I would have to have seventy-five thousand dollars to pay my debts.

Q. Did you see him or have any conversation with him after he had the conversation with his brother, and if so, what did he say in regard to his debts?

185

A. I don't remember having seen him after the settlement. I don't remember of having seen him.

Q. And you only know of the receipt of the ten thousand on account of that stock from what Mr. Thomas Merriam told you?

A. From what Mr. Thomas Merriam told me in regard to that. I saw Mr. Thomas Herriam the evening, I think it was, the evening that I. B. Merriam left for the south, and I asked Mr. Thomas Merriam how Mr. I. B. Merriam felt after he had given him that ten thousand, and he said he is as merry as a lark, and as happy as a clam, and he was going home feeling splendidly. That conversation occurred between Mr. Thomas Merriam and me, when we were out driving that evening.

It is agreed that exceptions to the form of question and to the inadmissibility of evidence, etc., may be made hereafter by either party, and not be made in the course of the taking of this deposition. This applies as well to the cross-examination as well as to the examination in chief of this witness.

Cross-examination:

Q. Mr. Robinson, what is the name of the corporation that was organized?

A. Tennessee Lumber and Coal Company.

Q. Under the laws of what State was the charter procured?

A. State of New York.

Q. Had the charter been procured before the deed from Merriam and Jarnagin was delivered?

A. That is a matter that Mr. Page will have to answer.

Q. The deed of conveyance from Mr. Merriam and Mr. Jarnagin was made to Thomas Merriam?

A. To Thomas Merriam, I believe, and Thomas Merriam conveyed it to the corporation. The details of that are all worked out by Mr. Page and Mr. Thomas Merriam.

Q. The purchase was made by Mr. Thomas Merriam as a part of the plan stock for the organization of the corporation?

235 A. The details of the whole thing were worked out by Mr. Thomas Merriam and Mr. Miller and our attorneys here and I had nothing to do with it.

Q. But you have previously stated that you had made arrangements for the organization of a corporation, and that your word and that of Mr. Thomas Merriam's were out to the friends that were to be connected with you, and now I merely ask you whether or not Mr. Merriam bought land or whether he took the conveyance of it with a view of conveying it to the corporation?

A. You will have to ask Mr. Page that question, because I had nothing, absolutely, to do with it.

Q. Then I suppose you are to be understood as saying that you don't know whether Mr. Merriam took title to the land with the purpose of conveying it to the corporation?

A. You had better make it that way.

Q. What was the capital stock of the corporation?

A. One million dollars.

Q. How much of that capital stock was issued to Mr. Thomas Merriam?

A. That I don't know.

Q. Who are the officers of the corporation?

A. Thomas Merriam, Lewis P. Miller, Chas. H. Sisson.

Q. What position does Thomas Merriam hold?

A. He is President.

Q. How much of the sixty-five thousand which Thomas Merriam is supposed to have invested in the land has he been repaid by the corporation?

A. I don't know.

Q. Has he been repaid any part of it from the proceeds of sales of stock?

A. I don't know.

Q. How much stock has been sold or subscribed for?

A. I couldn't answer that without seeing the books.

Q. The entire land was conveyed to Thomas Merriam, and Thomas Merriam made a conveyance of the entire land to the corporation. What consideration moved the conveyance from Thomas Merriam to the corporation?

A. I don't know.

Q. Had the corporation been organized by the election of officers at the time Thomas Merriam conveyed the land to it?

A. I can't answer.

Q. The corporation was organized, was it not, to hold title to and operate these lands, was it?

236 A. I presume so.

Q. Were you one of the incorporators of the Company?

A. I think my name was mentioned as one of the original incorporators of the company.

Q. Are you one of the directors of the corporation?

A. I don't know that the directors have been elected yet.

Q. Can you state whether or not the deed of conveyance from Thomas Merriam to the corporation was executed on the same day that the deed from I. B. Merriam and George H. Jarnagin to Thomas Merriam was delivered?

A. I can't.

Q. Had the charter of the corporation left the State of New York, or been registered in the State of Tennessee at the time the deed of conveyance was made by Thomas Merriam to the corporation?

A. I don't know, sir.

Q. Did Thomas Merriam sell out his interest in the land to the corporation?

A. If he had any interest, I suppose so.

Q. Do you know how that is?

A. I do not.

Q. Do you know when the stock of the corporation was issued to I. B. Merriam?

A. I do not.

Q. But I understand from statements in your examination in chief, that it was issued while I. B. Merriam was in Syracuse, New

York, when he went there to deliver the deed from Merriam and Jarnagin to Thomas Merriam, and to close the deal, was it not?

A. That is what Mr. Merriam told me.

Q. So it was manifestly before the charter could have been registered in the State of Tennessee, was it not?

A. I don't know.

Q. When you made the deal, or went to Tennessee to make the deal of the land, did you know the amount of the indebtedness from I. B. Merriam to his brother Thomas Merriam?

A. I knew that there was a large indebtedness. I didn't know the exact amount.

Q. Had Mr. Thomas Merriam told you that it was a large indebtedness?

A. He had.

Q. Had he told you that it was to be paid out of the proceeds of the sale of this land?

237 A. He had not.

Q. He had told you that he was secured by a deed of trust on this land, had he not?

A. Yes, he told me that four years ago.

Q. Soon after you became acquainted with Mr. Merriam?

A. Soon after we were in business together.

Q. Was Mr. Thomas Merriam then trying to sell this coal land?

A. I don't think Mr. Thomas Merriam ever tried to sell the coal land, not up to the time we went there.

Q. If Mr. Thomas Merriam ever made any efforts to sell the coal land you did not know it?

A. I don't know it.

Q. What was the occasion of Mr. Thomas Merriam's telling you that his brother owed him a large sum of money and that he held the mortgage on this land?

A. Why I suppose it was a friendly interest that Mr. Merriam held in me, and being closely identified in business enterprises we had no particular secrets from one another.

Q. Did he then tell you the amount of the indebtedness of his brother, I. B. Merriam, to him?

A. I can't answer that correctly.

Q. But he did tell you that it was a very large sum and that it was secured by a deed of trust or mortgage?

A. Yes, on the coal lands.

Q. Had you ever heard of the coal land in question until Mr. Merriam told you of the deed of trust?

A. Yes, I had heard of those coal lands before I knew Mr. Merriam.

Q. Can you recall how you heard of them?

A. I can.

Q. How?

A. Mrs. Penn of this City.

Q. Who is she?

A. Mr. George Penn was the owner of the Penn Spring Works here. When he died, Mrs. Penn telegraphed me to come here and take the management of his business, and when I came down from

Canada to look over the Spring business, I was then stopping at Mrs. Penn's house, and it was before I knew Mr. Merriam. She told me when I came down here that Mr. Merriam was an adviser and she asked me if I wouldn't like to meet him, this was two weeks after I came here. She told me of his having some land in the south that was supposed to be good coal land.

238 Q. When you speak of Mr. Merriam as being an officer of the Penn Works, you are referring to Mr. Thomas Merriam?

A. Yes, sir.

Q. And in a conversation soon after that Mr. Thomas Merriam told you that he held a deed of trust on that land?

A. Yes, sir.

Q. To secure a very considerable indebtedness?

A. Yes, sir.

Q. But didn't state the amount of it?

A. He did not.

Q. That you say was four years ago?

A. Well, as my memory serves me now, it was about four years ago.

Q. When did you come from Canada to Syracuse?

A. About five years ago.

Q. Has Mr. Thomas Merriam since that conversation, mentioned the indebtedness of his brother I. B. Merriam to you?

A. Not voluntarily.

Q. Involuntarily?

A. Yes, he showed me a plan of it.

Q. When was that?

A. Why it was before we went to Chattanooga, some time along there, I don't know, it may have been six months ago and it may have been four months ago, it was long about that time.

Q. Was it before your first trip to Chattanooga?

A. I can't say.

Q. You have been to Chattanooga several times?

A. Yes, sir.

Q. How many?

A. I can't say just exactly.

Q. Did Mr. Thomas Merriam tell you that in the purchasing of this land that this indebtedness was to be deducted and only the balance paid to I. B. Merriam?

A. He did not.

Q. When did you first ascertain that that was to be done?

A. I haven't ascertained anything. It was a private deal between Mr. Merriam and his brother and something that I knew nothing about.

Q. You knew nothing about the arrangement that the indebtedness from I. B. Merriam to Thomas Merriam should be deducted?

239 A. I knew nothing about it, nor how it was done.

Q. You say that Mr. Thomas Merriam involuntarily showed you a statement of I. B. Merriam's indebtedness to him some time ago?

A. Yes, sir.

Q. What was the occasion of his doing that?

A. I asked him how much it was and he says I have a statement here, I will show it to you.

Q. Can you assign any reason for wanting to know how much it was?

A. Idle curiosity.

Q. Was it before or after you entered upon the negotiations for these lands?

A. I couldn't tell you that.

Q. Were I. B. Merriam's affairs under discussion at the time?

A. They may have been and they may not have been.

Q. Did Thomas Merriam express any concern about it?

A. No particular concern.

Q. You had only heard of the matter casually because of this conversation with Mistress Penn some four years ago, on your friend recurring to the subject and as a matter of idle curiosity asked Mr. Merriam the amount of the indebtedness and he exhibited to you a statement of it?

A. Well at that time, Mr. Isaac Merriam was trying to sell the land. He had given an option to two or three people on the property, and I was quite anxious to know how it was going to come out.

Q. You were anxious to know whether the property would bring enough to discharge Mr. Thomas Merriam's debt?

A. I wasn't anxious in that regard. I knew that he had a mortgage on the land.

Q. But you didn't recall the fact that this was after you had taken up the subject of buying the land, and the inquiry as to the amount of indebtedness wasn't brought about by any concern you had with the disposition of the proceeds of the sale of the land?

A. None whatever.

Q. And you necessarily wanted to know whether the land would sell for enough to pay Mr. Thomas Merriam's debt?

A. A friendly interest in Mr. Merriam's affairs.

240 Redirect:

Q. During the time Mr. Merriam was sick, Mr. Robinson, who looked after his affairs?

A. Well I looked after a good deal of it. His wife, Mrs. Merriam, she asked me to open his letters and correspondence and I opened a good many of his letters. If there was anything that required looking after I took care of it. All of which I told him of after he got well.

Q. Had you any other time before his sickness or any time since aided him in any way in the management of his business?

A. Of his official business?

Q. Of any of his business?

A. He talks his business over with me from time to time. I spend most of my evenings with him, in his company, and you can readily understand that we would naturally talk over our business affairs together.

Q. How long has that been going on?

A. Since we have been associated in the steel business.

Q. About four years?

A. Four or four and one half.

Q. You say that Mr. Merriam in stating that this indebtedness existed expressed no concern about its payment?

A. No. He said that after he was well, after he got over that spell of sickness, that he would like to have it cleaned up, if it was possible to get it in shape, because he was in poor health and he couldn't tell, what might happen, and he was anxious to have all his business affairs put in such shape that it could be easily handled.

WM. HERBERT ROBINSON.

Sworn to before me, a Notary Public duly commissioned, and sworn August 25, 1903.

[NOTARY'S SEAL.] FRANK B. HODGES,
Notary Public, Owen. Co.

Mrs. ANNA ERNHOUT, next called and sworn deposes as follows:

Examined by Mr. SPURLOCK:

Q. Please state your residence and what your relation is to Major Thomas Merriam and Mr. I. B. Merriam, of Chattanooga?

241 A. 731 Euclid Avenue, Syracuse, N. Y. I am a sister to Mr. Thomas Merriam and Mr. I. B. Merriam, of Syracuse, and Tennessee.

Q. Were you in Syracuse in June last when Mr. I. B. Merriam came from Tennessee to close up a land deal with his brother?

A. I was.

Q. Did he stop with you or at your house any of that occasion, if so, how long?

A. Yes, he was there nearly all of the time. I think he came Wednesday morning and stayed with me all the time excepting two or three meals perhaps he was away, until he left.

Q. Did you have any conversation with him on the evening of his departure for home in regard to the settlement with his brother and his indebtedness at home or anything of that kind, if so, state about what he said?

A. Well, he said to me just before he left that he had been with my brother and came back, and I said to him, is everything settled satisfactorily, and he said it was. He said brother Thomas had done all right by him and that he didn't think he would have any difficulty in paying his debts, all of his debts, and keeping his home. He said, of course, he couldn't do it at once, but he had property to sell which he thought would bring enough to pay all his indebtedness, if they would give him time, but he couldn't do it just then, but he felt very certain that he could pay every debt.

Q. Did he say anything about whether he would be able to save anything out of his property, if so what?

A. He didn't say anything about that. He said that he could pay his debts and save his home.

Q. Prior to that time had he said anything to you about any controversy with his brother in regard to the sale or the price, or

had he been troubled, or appeared troubled about anything in connection with it?

A. Well, I don't know that he did particularly. I don't remember that he did. Of course, I think he felt troubled over his debts and about his business, but I don't know of anything about the settlement particularly.

Q. Had he had any conversation with you about it?

A. Well, he had spoken about selling his property, but I couldn't tell particularly about it.

Q. Hadn't he said any thing about having any dispute with his brother?

242 A. No, I don't think he did.

Q. And it was on the last day, just about the time he was starting for home that you had this conversation with him that you have detailed?

A. Yes, it was at the dinner table at six o'clock.

Q. And he left soon after for the station?

A. Yes, sir.

Cross-examined:

Q. How long have you lived in Syracuse?

A. I came here eleven years ago last spring.

Q. Where did I. B. Merriam stop during the visit you have just spoken of during the Sunday previous to his departure?

A. At my house.

Q. Where did he stop on the Saturday previous?

A. It was Decoration Day and he was at my house, to breakfast, had luncheon with Mr. Thomas Merriam and he came back and we went to the cemetery and he came back and had his supper at our house and stayed there all night.

Q. The time this trade was closed were you at all familiar with the amount that your brother I. B. Merriam owed your brother, Thomas Merriam?

A. No, sir, I knew nothing of it, and I don't know now.

Q. Did you know of the fact that he was indebted to your brother directly on account of loans and indirectly on account of endorsements to an extent exceeding sixty thousand dollars?

A. No, sir, I knew he had loaned him money, but I didn't know how much.

Q. Did you know of the fact that to secure this indebtedness your brother Thomas Merriam had a mortgage of htirty-five thousand dollars?

A. No, sir, I knew nothing about it.

ANNA ERNHQUT.

Sworn to before me, a notary public duly commissioned and sworn August 26, 1903.

[NOTARIAL SEAL.]

FRANK B. HODGES,
Notary Public, Orion Co., N. Y.

243 Miss MERRIAM ERNHOUT, being sworn, testified as follows:

Examined by Mr. SPURLOCK:

Q. State your name, age and residence?

A. Merriam Ernhout, 23 years of age, and I live at 731 Euclid Avenue, Syracuse, N. Y.

Q. What relation are you to Mrs. Ernhout who was just examined, and Mr. Thomas Merriam?

A. I am Mrs. Ernhout's daughter and Mr. Thomas Merriam's niece.

Q. You reside with your mother?

A. Yes, sir.

Q. Were you present on the day that your uncle I. B. Merriam left here last June for Tennessee?

A. Yes, sir.

Q. Did you hear him say anything on that occasion about the settlement with his brother in regard to the land sale, and about the effect upon his indebtedness at home, and if so state what he said?

A. When he came to our house from Mr. Thomas Merriam's, mother asked him if things were all right, because he had seemed sort of blue, and he seemed more cheerful, and he said yes, he thought that he would have enough to settle part of his debts there and that if a little time were given him he could settle all his debts and he would be all right. He said he had land in Chattanooga that he could sell, he thought, and with that and the money that he had he could settle his debts and save his home, and he spoke then of going on with his business, I suppose his grocery business.

Q. You say that just on the evening of his departure for Chattanooga?

A. Yes, as he left.

Cross-examined:

Q. Did you know at the time, that of which you spoke, of the amount of indebtedness that your uncle Mr. I. B. Merriam owed to your uncle Mr. Thomas Merriam?

A. I don't know anything about it.

Q. You knew that he was indebted to your uncle Thomas Merriam in the sum of over sixty-five thousand dollars?

A. I didn't know how much it was. I knew that he was indebted to him to a certain amount.

244 Q. Did you know that your Uncle Thomas had a mortgage of thirty-five thousand dollars on the property which was involved in that trade?

A. I did not know the amount at all.

Q. You stated, I believe, in your direct examination that previous to the time of the departure of your uncle, Mr. I. B. Merriam, and while he was here on that visit you had noticed that he was worried and in bad spirits?

A. Why he seemed worried; I suppose any one would in a similar position.

Q. Why do you suppose that?

A. I know the way I should feel myself.

Q. What do you know about his condition?

A. Well, I mean that he had a large deal to settle and he had debts; of course that would be enough to worry any one.

Q. And it would have worried you?

A. Yes, sir.

Q. You knew about these debts that he owed by hearsay?

A. I didn't know anything about them except that I heard he owed debts. I knew that he was probably in debt, I didn't know how much.

Q. Had you heard the matter of your Uncle I. B. Merriam's financial condition discussed in the family?

A. Why I have heard it spoken of, but I never paid much attention.

Q. Had you heard that your Uncle I. B. Merriam down in Chattanooga was considerably involved?

A. Why, yes, I knew that he was probably in debt or in trouble. I di n't know anything else about it.

Q. And very hard up?

A. Why, yes.

Redirect:

Q. You knew that he was largely indebted to his brother Thomas?

A. I didn't know who was his largest creditor.

Q. You just knew that he was largely in debt?

A. Well, I didn't know how largely. I knew he was in debt.

Q. You knew he owed a good deal of money?

A. Yes, sir.

Q. You didn't know whom he owed it to?

A. No.

245 Q. Did you not state in your direct examination that your Uncle I. B. Merriam was very much concerned about saving his home?

A. Why not that he was concerned, he mentioned that he could pay his debts and could save his home, not any more than about paying his debts. He didn't seem as much concerned about that as about paying his debts.

MERRIAM ERNHOUT.

Sworn to before me, a notary public, duly commissioned and sworn August 26, 1903.

[NOTARY'S SEAL.]

FRANK B. HODGES,
Notary Public, Orion. Co., N. Y.

(Here follows "Depositions of W. A. Sadd, T. G. Montague, A. D. Storey, N. Dietzen, N. H. Grady, G. H. Jarnigan and W. F. Kalb." Filed April 15, '04.)

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

In re I. B. MERRIAM, Bankrupt.

Petition of H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM ET AL.

The deposition of W. A. Sadd, T. G. Montague, A. D. Storey, N. H. Grady, N. Dietzen, Wm. F. Kalb and G. H. Jarnigin, taken on behalf of the petitioner in this cause, at the office of Williams and Lancaster, Temple Court, Chattanooga, Tennessee, on the 25th day of November, 1903, by consent of the parties, in the presence of Robert Pritchard and George D. Lancaster, attorneys for petitioner, and Frank Spurlock, attorney for Thomas Merriam.

It is agreed between the parties that all exceptions to the evidence in this cause, instead of being stated before the Commissioner, may be made before the court on the hearing; and the formalities of caption and certificate are hereby waived.

The signatures of the witnesses are also waived.

246 Mr. W. A. SADD, the first witness called, being duly sworn, deposed as follows:

(Examined by Mr. LANCASTER:)

Q. Mr. Sadd, where do you live?
A. In Chattanooga, Tennessee.
Q. How long have you lived here?
A. About fifteen years.
Q. In what business are you engaged?
A. In the banking business.
Q. With what bank are you connected and have you been connected since you have been here?
A. The Chattanooga Savings Bank.
Q. In what capacity?
A. President.
Q. State whether or not that bank held a trust deed from I. B. Merriam, the bankrupt in this cause, and Mr. Jarnigin on certain coal lands in Cumberland County, Tennessee, and if so for what purpose you held that deed?
A. We held a trust deed for $4,000 for four years on property in Cumberland County. The loans were originally made to clear up certain adverse titles.
Q. Do you know when the loan was first made?
A. I could not tell without looking up.

Q. To refresh your recollection, was it not made some time in 1896?

A. I believe it was.

Q. When was the loan paid off?

A. In 1903, at the time they made the sale to his brother and parties in the East.

Q. At the time who made the sale?

A. Merriam and Jarnagin.

Q. Has your bank carried the loan ever since it was made?

A. Yes, sir.

Q. How many times was the loan renewed from the time of its inception to the time of payment?

A. During the last year or two it was renewed every 30 or 60 days.

Q. Who attended to the payment of interest and renewals?

A. Mr. Merriam or Mr. Jarnigan, or both, Mr. Jarnigin attended to it himself mostly; Merriam was very slow about attending to his part.

Q. Did Jarnigin pay his part and Mr. Merriam his part or did one pay for both?

247 A. Each paid his part. At times Mr. Jarnagin had to advance Merriam's part for a few days. My recollection is that each paid his part with possibly one or two exceptions.

Q. How long have you known I. B. Merriam?

A. Ever since I have been here.

Q. In what business has he been engaged?

A. In the wholesale grocery business.

Q. Did he ever keep an account with your bank?

A. No, sir.

Q. Have you been familiar with his financial standing in this community during the past three or four years?

A. Yes, sir.

Q. What was his standing?

A. He was in rather straitened financial circumstances most of the time.

Q. State whether or not at any time from the beginning of the year 1897 until the bankruptcy of I. B. Merriam in this cause, you ever heard from any source of a secret mortgage or trust deed given to secure his brother, Thos. Merriam, for a loan made on the Cumberland County coal land?

A. I never heard of it until it developed in this proceeding.

Q. You say he never kept an account in your bank?

A. Yes, sir, but I will modify that by saying that there was an account of Jarnigin and Merriam from which this money to pay interest, etc., was disbursed.

Q. State whether or not Mr. I. B. Merriam ever drew any drafts on his brother, Thomas Merriam, through your bank, and whether Thomas Merriam ever drew any drafts on I. B. Merriam through your bank, and when it was, and what you know about these transactions, if any such transactions ever occurred.

A. Neither of the parties ever drew drafts directly through us; but we used to receive for collection every month for the last year

or two drafts which were drawn by Merriam on his brother and accepted by him.

Q. Drawn by which Merriam?

A. By Thomas Merriam?

Q. On I. B. Merriam.

A. Yes, sir.

Q. How frequently were those drafts drawn?

248 A. There would be from three to four of them a month of an average size from $1,000 to $1,500 each.

Q. How far back has this extended?

A. My recollection is two or three years. These drafts were drawn by Merriam in his bank at Syracuse and sent to banks in Baltimore or Philadelphia and then to us for collection.

Q. Where would you and how would you collect these drafts?

A. We would present them to the First National Bank, as they were payable there.

Q. Would they be paid promptly on presentation?

A. We always had to hold them over until after the close of business and until just before 5 o'clock, and then we would get a telephone message that the drafts were all right. That was customary, but there may have been a few cases where they were paid in the due course of business.

Q. In speaking of these drafts which Thos. Merriam drew on his brother, I. B. Merriam, in this city, state whether or not these drafts were sight drafts or whether they were given to pay time paper held by the Syracuse bank and made by I. B. Merriam?

A. They were all time drafts, 60 and 90 days and four months drafts, all practically negotiable paper. None of them were sight drafts.

Mr. Frank Spurlock, counsel for Thomas Merriam, waives cross-examination.

Sworn to before me this 25th day of November, 1903.

BRUCE FORSHEE,

[SEAL.] *Notary Public.*

T. G. MONTAGUE, the first witness called, being duly sworn, deposed as follows:

Examined by Mr. TRIMBLE:

Q. Are you now and have you been for some years President of the First National Bank of Chattanooga?

A. Yes, sir.

Q. I will ask you whether or not I. B. Merriam carries an account in the First National Bank, and if so, about how long?

249 A. No personal account of I. B. Merriam, but an account of Merriam & Sons was carried in the bank for many years continuously from the organization of the grocery firm of Merriam & Sons to the time of the failure of that firm.

Q. State whether or not during the past two or three years the financial condition of I. B. Merriam or I. B. Merriam & Son has

been good or bad, and particularly state what the fact was as to the promptness with which their checks were paid and matters of that kind.

A. The firm was hard up for ready money continuously for more than three or four years, and it was exceedingly difficult for them to meet their daily obligations; they did so, however, for a great portion of the time. They were always asking for favors, accommodations; extensions covering a few days. They had trouble toward the last to buy goods and keep up their stock.

Q. State whether there was any custom or system by which I. B. Merriam or Merriam & Son drew drafts on Thomas Merriam, of Syracuse, N. Y., and Thomas Merriam drew drafts on I. B. Merriam or Merriam & Sons, and without being particularly asked about it, tell just what that system was?

A. Merriam & Son claimed to have an understanding with Thomas Merriam by which Thomas Merriam would honor his sight drafts as he might have occasion to issue them. He did issue such drafts in various amounts repeatedly for several years. The plan for reimbursing Thomas Merriam for amounts that he paid on drafts of I. B. Merriam we knew very little about. The First National Bank took these drafts and they were usually paid on presentation in Syracuse. But drafts that Thomas Merriam may have made to reimburse himself for the amounts paid on account of I. B. Merriam did not come to the First National Bank. We, therefore, know nothing of that part of the transaction.

Q. State whether there at any time came to the First National Bank for collection, or otherwise, paper that had been discounted or held by banks in Syracuse, N. Y., upon which Thomas Merriam's and I. B. Merriam's names appeared?

A. As I have stated, those drafts or notes from Thos. Merriam did not come to the First National Bank for collection. We know nothing of them only as I. B. Merriam told us that he had
250 certain obligations to meet in other banks from Syracuse, and that it was necessary for him to draw on Thomas Merriam to meet these obligations. I have referred to the books of the First National Bank and find that sight drafts were drawn by Merriam & Sons to February, 1900, amounting to $2,800.00; in January, 1900, $4,500.00. Some drafts of Merriam on Syracuse appeared to be made for only temporary purposes and were issued over and over again for the same amounts. Some items of $750.00 appeared as often as twice a month for a long period. Other amounts did not appear for 60 to 90 days, indicating that they were to take up time papers.

Q. State whether or not at greater or less intervals demand was made at the First National Bank by the Chattanooga Savings Bank for the payment of paper coming from Syracuse which on its face was payable at the First National Bank against I. B. Merriam & Sons in favor of Thomas Merriam or the Syracuse banks?

A. Not generally. We do not think such paper was made payable to the First National, but it was purposely made payable at some other bank. It was settled at the banks where it was made payable

or to whom it was sent and was not settled through the First National Bank, except that the First National might honor the check of Merriam to the bank holding the paper for collection.

Q. Please state whether or not you have ever had any conversation with I. B. Merriam in regard to his selling mountain land which he owned in common with G. H. Jarnigin, and what, if an-, representations he made to you about his ability to and intention of paying all his debts after a sale of said property?

A. I had repeated conversations with Mr. Merriam at different times during the past six years. He always expressed his ability to pay everything the First National Bank held against him whenever he could realize on the property referred to. He had at various times different parties to whom he hoped to sell the land, and at these times he expressed himself as able to take care of his liabilities if the sale was consummated.

Q. State whether or not Mr. Merriam at any time informed you concerning any incumbrance on that mountain land, or gave you any kind of information concerning it, and state the circumstances under which such information was given, and the nature of it.

251 A. I told Mr. Merriam repeatedly that we were unwilling to extend further accommodation to him in the way of credit or loans and that I was afraid to take sight drafts or time drafts on Thomas Merriam without some written authority or obligation from Thomas Merriam to the effect that he would protect drafts whenever they were made. Mr. I. B. Merriam always assured me that he had an arrangement with Thos. Merriam by which he, Thos. Merriam, would honor any drafts that he might make, though he never did give me any written authority from Thos. Merriam to that effect. He did not tell me in so many words that Thos. Merriam held a mortgage on the Roane County land, but said that Thomas Merriam had the sale of the property and that he would protect these drafts as he, I. B. Merriam, had occasion to draw.

Q. State whether or not, leaving out of consideration the mountain land, I. B. Merriam was solvent or insolvent?

A. Absolutely insolvent.

Q. State whether or not the accommodations extended to I. B. Merriam or Merriam & Sons were entirely upon the faith of the mountain land and the credit of Thomas Merriam.

A. They were. We understand that all the property of I. B. Merriam outside of the mountain land was encumbered for more than it was worth or would sell for under any circumstances.

Q. For about how long a period has I. B. Merriam been drawing drafts and receiving other accommodations of which you know from Thos. Merriam?

A. I think since the organization of the business of Merriam & Son as successors of Merriam and Storey.

Q. Do you know about what date that was?

A. It is not less than six years.

Q. To refresh your memory, I will ask you if it was not in the spring or summer of 1896?

A. Well that would be about six years from the time of the failure.

Q. State whether or not at any time Thos. Merriam gave the First National Bank his own paper to pay or secure any indebtedness of I. B. Merriam?

A. The First National Bank has held Thos. Merriam's paper for $10,000 continuously for the past six years.

Q. Was that for his own benefit or the benefit of I. B. Merriam?

252 A. For the benefit of I. B. Merriam, and for which the First National Bank gave I. B. Merriam credit.

Q. State whether or not the checks of I. B. Merriam or Merriam & Son were frequently rejected when presented at the counter of the First National Bank?

A. Quite a number of their checks were dishonored.

Q. State whether or not Merriam subsequently made the account good and had the checks paid?

A. They were generally protected. Sometimes he sent checks off to pay for goods bought and he claimed they got into the bank one or two or three days sooner than he anticipated and after a few days he did succeed in providing for the payment of the checks.

Q. Mr. Montague, do you recall having a conversation with Mr. Thomas Merriam within the last few years on the financial condition of his brother, I. B. Merriam?

A. No, I have no acquaintance with Thos. Merriam. I don't believe I would know him if I would see him. I do not remember to have ever talked with him as to his brother's financial condition.

Cross-examination.

By Mr. SPURLOCK:

Q. You made an examination of the books of the bank preparatory to answering these questions?

A. Not covering any long period. I simply examined the books in 1899 and 1900 so as to ascertain about the amount of drafts drawn by I. B. Merriam or Merriam & Sons on Thomas Merriam at Syracuse. I have not examined the bank books any further.

Q. You were asked to make the examination with reference only to the passing of drafts between the two brothers?

A. That is about all I thought would be required in answering the questions that might be asked me.

Q. And it was with reference to that subject that you made the examination of the books?

A. Yes, sir.

Q. And you say you found no evidence that the bank had paid any drafts drawn by Thomas Merriam on I. B. Merriam within that period?

A. I did not look for that and stated that from recollection only

253 Q. All that the books show on that subject is that a number of drafts were drawn by I. B. Merriam on Thomas Merriam and paid by him.

A. I have stated that I have made no examination of the books so as to answer that question.

Q. I understand you state in your original examination that if any such drafts were drawn they were purposely paid at another bank. What did you mean by that statement?

A. I meant there were so many of these obligations payable at some other bank that it impressed itself on me as being a universal question.

Q. What other banks were they payable at?

A. Generally at the Chattanooga Savings Bank.

Q. These drafts were drawn payable at that bank you speak of?

A. I did not see the drafts and do not know. I simply know that the Chattanooga Savings Bank repeatedly called up the First National Bank by telephone to ascertain if the First National Bank would honor the check of Merriam and Sons for quite considerable sums that went to pay obligations of I. B. Merriam and Merriam & Sons at that bank; and I further understood that these obligations were from Thomas Merriam at Syracuse, N. Y.

Q. In what shape were these obligations?

A. I did not see them.

Q. What did you understand about it and from whom did you get the understanding?

A. I. B. Merriam often showed me notices of paper maturing at Chattanooga Savings Bank for which he wished the First National Bank to honor checks in favor of the Chattanooga Savings Bank. I knew from these notices that they were for notes maturing there, and either I. B. Merriam or his son Frank Merriam told me the notes were obligations made to Thomas Merriam for his benefit.

Q. So the information had come either through I. B. Merriam or his son, Frank?

A. Yes, or the notices of maturing notes in their possession. As I stated, we were often asked by the Chattanooga Savings Bank if Merriam & Sons' check was good for the notes they were about to take up, and this might be regarded as additional information.

Q. And your communication- with them were always in connection with notes maturing at the Chattanooga Savings Bank?

254 A. No, sir we talked about a great many other things. All the conversations were not in reference to these notes.

Q. What I mean is the communications or conversations you had with them about the Chattanooga Savings Bank was with reference to notes maturing there?

A. I think so.

Q. When did these conversations with reference to notes maturing at the Chattanooga Savings Bank commence?

A. I could not tell. They would probably cover two or three years past.

Q. In answer to requests made by I. B. Merriam in regard to honoring his checks, what was your answer, or what was done?

A. If Merriam and Son had arranged for payment of the amount named, the Savings Bank was so advised; but if they had not ar-

ranged for the payment of such checks, they were so informed—that the bank would not pay them.

Q. They were always paid sooner or later, were they not?

A. I have no means of knowing. There might have been instances where they were not paid, but they were generally paid.

Q. How much did I. B. Merriam owe the First National Bank at the time of his failure?

A. He owed us direct obligations and then he was endorser on a great many pieces of paper made by customers of the grocery house. Merriam from year to year became less and less able to carry a large and varied stock of groceries, and the effect of this was to limit his trade to dealers in rather poor trade credit. He therefore was the holder of a good deal of paper taken from country customers whose standing was financially poor. The result of this was that when the First National Bank would discount this paper for the grocery firm, and the payers were unable to meet it, that Merriam was not able to meet it; therefore, the bank had to renew, thus holding paper with Merriam's endorsement. This added to the obligation of Mr. Merriam. I could not give from recollection the total amount of the firm's obligation because of the large number of pieces of paper on which they were liable as endorsers.

Q. Were these notes discounted by the bank?

A. They were.

Q. On the faith and credit of the makers of the notes?

A. And Mr. Merriam's endorsement.

255 Q. The bank took them as bankable paper?

A. The bank took them because it was the best thing they could get, and Mr. Merriam's necessities induced them to take what they would prefer not taking if they could have had their choice.

Q. But I understand that the debt of the bank was largely increased in this way?

A. I suppose that his daily necessities for money induced the bank to take paper that they could not feel was first-class.

Q. How late in the course of his business was the last of these transactions?

A. Up to within ten days of his bankruptcy.

Q. All the drafts he ever drew through your bank were paid by his brother were they not?

A. All he ever drew on his brother, Thomas Merriam, were eventually paid.

Q. They were all paid at maturity, were they not?

A. No, a few sight drafts were returned under protest.

Q. When was that?

A. Mr. Merriam explained that by the statement that his brother had had an operation performed and was in the hospital and therefore, unable to attend to business.

Q. Was that at the time he was in the hospital?

A. I suppose so, but I have no personal knowledge of the matter.

Q. With the exception then, of the time he was in the hospital, all the drafts drawn on him were paid?

A. With the exception of the time Mr. I. B. Merriam said his brother was in the hospital, they were.

Q. Do you remember when that was? Was it in the summer or fall before the failure?

A. It was longer ago than that.

Q. And you say that some of these drafts, as the books now show, were all for $750?

A. No, I did not say that.

Q. What did you say in regard to the $750 drafts?

A. I said the $750 drafts were repeated very frequently—more frequently than any other. This led us to believe that both parties were endeavoring to get credit by kiting, that is each drawing at sight on the other. When we found that these drafts were frequently repeated, we refused to cash their sight drafts, notifying Mr. Merriam that he must arrange with his brother for loans at Syracuse to provide for his immediate wants; that we would
256 not cash sight drafts to be paid by his brother drawing sight drafts on him; that if they needed $750 or any other sum he must make time paper and get the money there at Syracuse as we would not continue that business.

Q. When was the first of these drafts that excited your suspicion?

A. I cannot give any date. We took such drafts for several months after we became satisfied they were only temporary accommodations.

Q. When did you cease to take them?

A. We continued to take drafts for notes maturing at the Chattanooga Savings Bank up to the time of Mr. Merriam's failure; but for probably a year prior to that we did not take sight drafts to enable Merriam to protect his obligations for a day or two.

Q. So, as far as you know, there were no sight drafts of this kind drawn through your bank for a year before the failure?

A. We continued to cash sight drafts to pay notes or time obligations, but we refused to cash sight drafts which were only intended to give Merriam and Son time for the draft to reach Syracuse, when a sight draft would be drawn on Merriam and Son to take it up. Sometime instead of a sight draft being drawn at Syracuse on Merriam and Son, Merriam and Son would send their check on the First National Bank to Syracuse to be used to take up—to take the sight draft up that they had made on Thomas Merriam. Both of these transactions were refused to carry on or be a party to.

Q. Now what was the date of the first transaction when a sight draft was drawn intended to give credit for a day or two?

A. I could not tell without making a careful examination of the account at the bank and even then I could not know certainly as to the transaction.

Q. When was the transaction when you first discovered certainly that such was the purpose, and what was the evidence of giving one check or paper representing the same transaction from the two ends of the line?

A. Unless we had access to the transaction at Syracuse, we would have no means of knowing or locating the transactions referred to.

Our information would be drawn from inference rather than positive knowledge.

Q. Cannot you give a single transaction within your own knowledge showing a check or paper drawn so as to constitute what you call "kiting"? If so give the date and describe the paper.

257 A. On October 25th, 1899, Merriam and Son drew a sight draft on Thomas Merriam at Syracuse, N. Y., and deposited the same in the First National Bank of Chattanooga, for $750; on Nov. 6th, he drew for the same amount; on Nov. 25th, for the same amount; on Dec. 4th, for the same amount; on Dec. 18th, for the same amount; on Jan. 27th, 1900, for the same amount, on Feb. 1st, for $750; on Feb. 12th, for $750; on March 7th, $750. While we do not know that Thomas Merriam drew drafts on I. B. Merriam to pay these drafts that were presented in Syracuse, we believe such to be the case from the regularity in which these sums appeared and their frequency. We, therefore, came to the conclusion that they were carrying $750 by sight drafts between Chattanooga and Syracuse for the purpose of getting the use of $750.

Q. All your suspicions of kiting then dwindles to the securing of this $750 between the two parties?

A. There were other amounts similar, and we were made to think they were dropping into this plan of obtaining money for temporary use, which we regarded as dangerous and refused to allow it to be continued, so far as we could trace any such transactions.

Q. Now, please give us another amount of credit that was procured by kiting in the same manner that the $750 was, stating the papers that evidenced the security of any such sum?

A. Merriam and Son drew on Thomas Merriam on Dec. 14th, 1899, for $650, on Dec. 30th he drew again for $650. This would indicate that it was a temporary accommodation for that amount. At various times he drew for $500, and this might be repeated four times and then the item would disappear. The notes I refer to were usually for larger amounts, sums from $1,000 to $1,500 each.

Q. What notes do you refer to?

A. Those paid through the Chattanooga Savings Bank as I have explained.

Q. Can you give us a list of them?

A. I have stated that those notes did not come to us and I have no list of them. I have never seen the notes.

Q. What personal knowledge have you of these notes?

A. I told you that I had seen notices of such paper maturing at the Chattanooga Savings Bank, shown me by Merriam & Son.

Q. You say you saw those notices in their hands?

A. Yes, sir.

258 Q. And they brought them to you?

A. They were brought to me to show me that Thos. Merriam would honor their drafts, so that he would rediscount the paper in Syracuse to provide the money.

Q. What do you mean when you state in your original examination that this kiting as you call it was conducted by another bank and not through yours, for the purpose of hiding it from you, and

how do you reconcile that with the fact that Merriam & Son brought you notices of these notes if they were part of that kiting transaction?

A. I do not recall saying that the notes were paid at the Chattanooga Savings Bank to deceive me.

Q. Did you not say in your original examination that these transactions were carried on at other banks purposely?

A. Yes, sir; but not to deceive me.

Q. What was the purpose?

A. It may have been done to give the parties in Syracuse a better report of the condition of Merriam & Son, or it may have been done because the correspondent of the Syracuse bank was the Chattanooga Savings Bank.

Q. The latter reason would not evidence any purpose at all, would it, but would only be the mere accident of relationship between banks?

A. It was no accident at all. It is a question of one bank having a correspondent and another not.

Q. There would be no purpose in that though, would there, in the sense that you use "purpose" in your original examination?

A. It would carry the paper to the Chattanooga Savings Bank *of* the Chattanooga Savings Bank was the correspondent of the eastern bank holding the Merriam paper under discount.

Q. But what purpose would there be in the sense that you use the word "purpose" in your original examination?

A. I wish to have read that portion of my original examination where I used that word referred to.

(That portion of the testimony was here read to the witness.)

A. It may have been that the Chattanooga Savings Bank accounted for the proceeds of the paper paid to the eastern bank from whom they received it at a less cost or exchange; or it may have been simply because they were the correspondents of the bank from whom they received the paper. I do not know that there was any
259 wrong or attempt at wrong doing on the part of Mr. Merriam in making the paper or paying the paper to the Chattanooga Savings Bank.

Q. According to your answers, now, then, if there was any purpose at all to deceive or mislead in regard to the credit of the parties, it was a purpose to deceive or mislead the parties at Syracuse who discounted the paper there?

A. I do not know anything about it.

Q. How often had that $750 draft been repeated before you had your conversation with Mr. I. B. Merriam in regard to your determination to refuse such drafts?

A. I could not tell without a careful examination of the bank books.

Q. I understood you to state in your original examination that you understood from I. B. Merriam that his brother Thomas Merriam had authorized him to draw for any money that he needed; was not that so?

A. I said that I. B. Merriam told me that his brother Thomas Merriam would protect any drafts that he, I. B. Merriam, or Merriam & Son would make.

Q. And Thomas Merriam had protected drafts to a considerable extent, had he not?

A. Yes, sir.

Q. Why was it at the time this $750.00 draft was floated so long by kiting that there was not some suggestion to him or some arrangement made by which that could be taken up in the same way.

A. I have no information whatever on the subject. I don't know.

Redirect examination by Mr. TRIMBLE:

Q. Referring to the notes of Merriam & Son's customers endorsed by Mr. Merriam, about which you testified on cross examination, state whether or not those notes were, in many instances, given for the purpose of paying interest on obligations which the bank already held against Merriam & Sons?

A. There was no way of separating the obligations of Mr. Merriam so as to know which notes were taken for interest and which were to pay drafts which Mr. Merriam had maturing. He was so pressed for money daily for years that these papers were taken sometimes
260 for one object and sometimes for another, just to meet the ordinary demands of any hard up business firm.

And further this deponent saith not.

Sworn to before me this 25th day of November, 1903.
[SEAL.] BRUCE FORSHEE,
Notary Public.

Deposition of A. D. Storey.

Mr. A. D. STOREY, the next witness called, being duly sworn, deposed as follows:

Examined by Mr. LANCASTER:

Q. How long have you lived in Chattanooga?

A. Since 1890 or 1891.

Q. From what State did you come to Tennessee?

A. Texas.

Q. You came here in 1891?

A. It was in the last part of 1890 or the first of 1891.

Q. How long did you stay when you first came here?

A. About a year.

Q. Where did you go then?

A. I went to Baltimore.

Q. What caused you to return to Chattanooga?

A. I got a telegram from a friend to come back here, that he had a good opening for me.

Q. What was the opening?

A. To form a partnership or go in business with I. B. Merriam.

Q. When was this?
A. In 1892.
Q. You formed a partnership at that time with Mr. I. B. Merriam?
A. Yes, sir.
Q. What were the terms of the partnership? On what conditions did you come into the firm?
A. I paid him $23,000 in cash and took a two-fifths interest in the business; he had a three-fifths interest.
Q. How long did that partnership last?
A. About four years; until 1896.
Q. You say you put into that firm $23,000 in cash?
261 A. Yes, sir.
Q. What did I. B. Merriam put into the firm?
A. His stock of goods, notes and accounts.
Q. And for this stock of goods, notes, accounts, etc., he received a three-fifths interest in the business?
A. Yes, sir.
Q. What contract, if any, did you have with I. B. Merriam in reference to the value of the notes and accounts?
A. He guaranteed the notes and accounts he put in as an asset; the merchandise showed for itself.
Q. Please state what you found after you became a member of the firm as to the actual condition or nature of these accounts and bills receivable which Mr. Merriam put in the firm as you have just described?
A. The majority of them were worthless.
Q. How old were they?
A. Some of them had been in ever since he had been in business. He was in business before I came here, and those accounts had been charged off to profit and loss and they had been brought up again on the new ledger as good assets.
Q. After you first discovered that, state whether or not you and Mr. Merriam had a readjustment of your affairs, and what that adjustment was?
A. At the end of the first year we charged back enough of those old claims to make us equal partners, with the understanding that whatever of those accounts could not be collected should be charged off again.
Q. And you remained a partner three years longer in that firm?
A. Yes, sir; I tried several ways to get out and finally did get out of the firm.
Q. That was in 1896?
A. Yes, sir; in 1896.
Q. At the time you left the firm, what was the actual value of the interest in the firm belonging to Mr. Merriam?
A. He had drawn out everything; he owed the firm $5,000.
Q. Did he have any interest in the firm?
A. He owed the firm $5,000 at that time.
Q. Do you mean that after charging off the accounts he was a debtor to the firm in the sum of $5,000.
A. Yes, sir.

Q. What were the terms of the dissolution of the partnership?

262 A. I just sold my interest. I sold it for $12,000 and took his notes for it.

Q. How long did you hold these notes, Mr. Storey?

A. I am holding them yet, except the $2,500 that he paid me during the four years.

Q. Do you recollect when he paid you the $2,500?

A. He paid it in 1896. He paid it that year. They were all 60 day notes, and he paid $2,500 during that year.

Q. When you dissolved partnership and sold to Mr. I. B. Merriam your interest in the firm, was the firm indebted to Thomas Merriam of Syracuse, N. Y., in any sum?

A. Not a dollar.

Q. Was Mr. I. B. Merriam at that time indebted to him?

A. Not that I know of.

Q. State whether or not the firm of Mr. Merriam, to your knowledge, ever made any effort to borrow money of Mr. Thomas Merriam?

A. He went up there to borrow money for the firm and the firm paid the expenses of the trip; he went up to get $5,000, but he refused to let him have it. He refused to loan the firm the money.

Q. When was that?

A. I went up in February, 1896, and it was a short time before that. It may have been December of the year before or the first of that year. Anyway it was right before I went out. We were in bad shape—practically bankrupt—and were trying to get some money, and he refused to let us have it.

Q. Why have you held this balance of $9,250.00 against I. B. Merriam since 1896 and not collected it? What was the inducement, if any, that led you to leave that debt uncollected?

A. I was *pursuaded* by him that he had a large body of coal land up in Cumberland county that I knew all about; he had been talking about it ever since I went in business with him, and he said it was increasing in value every year, and he was then trying to sell it every day or month. He was always trying to sell the land, and he said when he did I would get my money.

Q. Did you ever receive any communication from Thomas Merriam in regard to the debt of $9,250.00 owing to you, and if so, when did you receive such communication, and was it oral or written, and from whom and by whom?

263 A. He dictated that I should not try to collect any more money and must carry the account and keep the thing afloat and keep Mr. Merriam from collapsing in that business there, and that I must carry the debt until he could sell the land.

Q. What land?

A. The coal land we are talking about. It was unencumbered and the commercial reports made to New York under Merriam's and my signature said the land was unencumbered, and I relied on that. He told me he was going to sell the land and that when he did I should have my money.

Q. When did you receive the communication from Thos. Merriam that you have just described?

A. That was on the first visit here. He came down to look into the business, and that was what he told me in 1896.

Q. That was during his visit in 1896?

A. Yes, sir.

Q. By what means did he convey this communication to you?

A. Through Mr. Merriam and his son, Frank.

Q. Through I. B. Merriam, you mean?

A. Yes, sir.

Q. Where was that?

A. In his office. We were on friendly terms and I often visited there and talked with them and that is the message that was sent me.

Q. Is the bankrupt Merriam still indebted to you in this sum.

A. Yes, sir.

Q. State whether or not he is liable to you in any other sum, and if so, what it is?

A. In order to carry him along in business, I had letters from Mr. Montague, President of the First National Bank that I must go security on $6,250.00 or he would have to proceed against Merriam and Son and thereby throw the business into bankruptcy and that means i would be a looser too. He said in order to carry the business on and wait until this land was sold, I must come forward and go security on this $6250, which I did.

Q. You remained security on that debt until the bankruptcy?

A. Yes, sir. I have a judgment against me for it now.

Q. How did this debt of $6,250 originate? Did it originate before or after you dissolved partnership?

264 A. That was the amount we owed the bank

Q. You remained endorser on that?

—. ——.

Q. How often since the dissolution of the partnership have you been in the store of Merriam and Son on Chestnut street in this city?

A. I visited there all the time. We were very friendly and besides I was there once a month regular on business strictly,—to renew the notes and collect interest.

Q. What inducement, if any, did Merriam hold out to you whereby you were pursuaded to grant him this extension of time? What hope of payment was there and on what was that hope based?

A. He assured me all the time that he was going to get a big price for the land; that it was unencumbered and if sold would bring a big price and he would have plenty of money to pay all his debts and that he would pay me.

Q. What land?

A. The land in Cumberland County. He owned 10,000 acres, a half interest with Mr. Jarnagin. He would go up there to show the land to different parties who were here to see it. I don't know who the parties were except in a general way. I know there were some people from Pennsylvania that came down and looked over

the land and talked of buying it. His brother took hold of it at last and said he would sell it for him.

Q. When did you first learn that there was a secret deed of trust on that land executed by I. B. Merriam in favor of his brother, Thos. Merriam?

A. I never heard of it until in Court when Merriam announced it on the stand.

Q. What do you mean by the Court? On what occasion was it?

A. During the bankruptcy examination. I learned that was the case through the lawyers I talked to.

Q. That is the first information you had on the subject?

A. Yes, sir.

Q. State whether I. B. Merriam or his sons ever mentioned that before.

A. No, sir.

Q. And you say you called on and talked to I. B. Merriam and once a month regularly?

A. Yes, sir. I called on him frequently and once a month anyway to renew notes and collect interest.

Q. Now, were these assurances you speak of to the effect
265 that when the property was sold you would be paid up, were they continued up to the time the sale took place in 1903?

A. He pledged me most positively that I should have my money every time I talked with him right up to the very last hour before he took the bankruptcy law. I went in to see him about a check of his that the bank had turned down and he said "Mr. Storey, just wait a little while now; I am going to sell the land now and you shall have your money."

Q. Did you know prior to the bankruptcy the extent to which he was indebted to Thomas Merriam of Syracuse, New York?

A. I did not know he owed him a dollar. Thos. Merriam refused to loan us anything I know. I didn't know anything of it.

Q. Now, exclusive of the coal property referred to, from your knowledge of the condition of Merriam and Son, and the extent of his outside indebtedness secured by mortgage on his real estate in Chattanooga, state whether or not he was solvent or insolvent during the last two or three years?

A. He was insolvent when I first went with him and has been insolvent ever since.

Q. You have stated that you were in his store frequently during 1902, 1903 and in fact ever since you dissolved partnership. Please state what was the condition of his stock of goods from September, 1902 to May, 1903, as you saw it in that store. I am referring now to the quantity and value; whether large or small?

A. Very small. It was not even a large retail stock. $1200 or $1500.00 would cover it.

Q. Was that fact manifest and apparent to anybody who might visit the store?

A. Anybody could see the condition who would go in and see the stock, and know that it amounted to very little. There would be just a few boxes scattered here and there.

Q. And that existed during 1902 and 1903 up to the time of the bankruptcy?

A. Yes, sir. He came to me last year and tried to borrow $250.00 from me.

Q. Did you let him have it?

A. No, sir, I didn't have it to loan him then.

Cross-examination, by Mr. SPURLOCK:

Q. You say Mr. Merriam has been insolvent ever since before you went in business with him?

A. After I got in with him I found it out.

Q. He was insolvent before that.

266 A. I did not know it until after that.

Q. Well, from 1892 he has been absolutely insolvent?

A. Yes, sir.

Q. You sold out in 1896?

A. Yes, sir, in February, 1896.

Q. State where you were carrying on business?

A. On Chestnut street.

Q. The same place where the store is now?

A. Yes, sir.

Q. You were familiar with the house and where the goods were kept and how they were kept?

A. Yes, sir.

Q. Now how did you know that I. B. Merriam ever made any application to borrow $5000 from his brother?

A. He went up there for that purpose. The firm sent him up there and paid his expenses.

Q. And he came back and reported that he did not get it?

A. Yes, sir.

Q. And that is all you know about it?

A. I knew he got it from somebody else.

Q. You never had any communication with Thos. Merriam himself on the subject?

A. No, sir, but I know we did not get the money from him.

Q. And I. B. Merriam or his son Frank, said that you must carry that debt longer did they? They came down and reported to you what Thomas Merriam said?

A. He said his brother dictated that I must not press him for any more money until he could sell the coal lands.

Q. You had no conversation with the brother himself?

A. No, sir.

Q. You never had any conversation with him?

A. Only a few minutes but that was not on business.

Q. You never talked about these debts you had at all?

A. No, sir, I never saw him but one time, and then there were a number of people in the office conversing about the railroad etc., and I had no chance to talk with him about the other matters.

Q. And all you ever heard about these debts was from I. B. Merriam or his son Frank?

A. Both of them, yes, sir.

And further this deponent saith not.

Sworn to before me this 25th day of November, 1903.

[SEAL.] BRUCE FORSHEE,
Notary Public.

267 *Deposition of N. Dietzen.*

N. DIETZEN, the next witness called, being duly sworn deposed as follows:

(Examined by Mr. LANCASTER:)

Q. How long have you lived in Chattanooga, Mr. Dietzen?
A. About 33 years, more or less.
Q. In what business are you engaged?
A. At present I am engaged in the wholesale fruit and commission business.
Q. How long have you been in that business?
A. Something over twenty years.
Q. What is the name of the firm with which you are connected?
A. It has been, and is now N. Dietzen and Bro.
Q. Are you acquainted with I. B. Merriam the Bankrupt in this cause, and if so how long have you known him?
A. I have known him 10 or 12 years more or less.
Q. In what business has I. B. Merriam been engaged here since you have known him?
A. In the wholesale grocery business.
Q. Has there been any business relation between himself or his firm and your concern during that time?
A. Yes, sir, I do not remember how long we have had accounts against one another, though I remember in the '90's when I was absent on my farm we had considerable business together. We bought some goods from him and he bought some from us.
Q. How much did he owe you at the time of the bankruptcy?
A. Something like $1200; it was near that though I could not tell without looking at the papers.
Q. If you have a statement of the items of your account against I. B. Merriam, please file same and mark it "Exhibit "A" to this your deposition?
A. I have the statement and file it as "Exhibit A" to my deposition.
Q. How far back do the items go?
A. I do not know how far. In 1902 it seems the account was settled up by notes.
Q. Were those notes ever paid?
A. No, sir.
268 Q. Do you still hold those notes?
A. Yes, sir.

Q. State whether or not those notes were ever put in the hands of an attorney for collection?

A. After we tried to collect them and could not, we turned them over to Williams and Lancaster for collection.

Q. Did they bring suit on those notes?

A. No, sir.

Q. Why not?

A. Because they did not think they could make it by law. There was nothing there to make it out of.

Q. State whether or not after you put those notes in the hands of your attorneys for collection you were called on by I. B. Merriam and asked by him to withdraw the notes from your attorneys' hands, and what inducement he held out to you for future payment?

A. Mr. Merriam came down to the store and called on me there, I was not in at the time and Lindsay hunted me up and told me. I went in and he called me aside and begged me like a trooper, like a good fellow; in fact he nearly cried. He said "Dietzen we have been good friends for nine or ten years. I am in hard luck and have no money to pay these bills; but I promise you that as soon as I sell my coal land I will pay every penny and pay good interest too. And furthermore, I assure you we shall throw our trade in your hands." He repeatedly made the statement to me at different times when the note came due.

Q. Did he make any such statement to you during the last year?

A. Yes, sir; not later than two or three months ago was the last time.

Q. Did he ever tell you that he had given a secret deed of trust on that property to his brother, Thomas Merriam?

A. No, sir; he always said he was about to sell it and was going to get a good price for it and would pay up all his debts.

Q. When did you first learn of such a deed of trust?

A. Not until bankruptcy was declared.

Q. How often were you in Merriam's store during the year preceding the bankruptcy?

A. Twice or three times during the last year or so.

Q. State whether or not, when in the store, you noticed the size of the stock of goods and whether they were of much or little value?

269 A. It was very small the last time I was in there; there was hardly anything at all but a few lots of goods he had had in there for a long time—goods there was not much demand for.

Q. How in fact did he carry on his business during the last year or two?

A. In this way: His orders, when they came in, he would purchase in local markets. He carried hardly any stock himself.

Q. Was the condition of his stock manifest to any body who came into the store?

A. Yes, sir.

Q. What was the condition of I. B. Merriam's credit during the last two or three years?

A. They couldn't get anything anywhere hardly. The brokers and packing houses would not sell them.

Cross-examination by Mr. SPURLOCK:

Q. Mr. Dietzen, you continued to sell to Merriam up to the time of the failure did you not?

A. We sold him for cash. He paid cash the last six months.

Q. But up to that time you had been selling him goods?

A. I don't remember just how long before the failure we had been selling him for cash.

Q. Was it during that time that he kept the small stock?

A. Yes, sir.

Q. But up to that time he had kept a large stock?

A. Yes, sir; he had a pretty fair stock.

Q. And it was only during the latter part of business that his stock was reduced?

A. Yes, sir.

Q. And he then confined his operations to city trade?

A. When my brother died about two years ago, we had to close down on him. He hadn't paid his past account, and we told him he would have to pay cash after that.

Q. How often were you at his place?

A. Possibly three or four times in the last two years. Well, I don't know. When I would be passing, I would sometimes stop in.

Q. Were you there at all during the past year?

A. Yes, sir; once, about the election.

Q. What time was that?

270 A. Well, I couldn't tell. I just passed by there sometimes when I was going on my way to the Nashville depot or somewhere, and I would just stop in.

Q. Well, that one time was the only time you were in there during the past year?

A. Yes, sir; that is about all.

Q. And you were only in there two or three times during the past two or three years?

A. Yes, sir.

Q. After your brother died, you commenced settling up accounts, did you?

A. I commenced trying to settle them up. We had to stop selling to Mr. Merriam on credit then.

Q. That is, the last six or eight months you quit?

A. Somewhere along there, yes, sir.

Q. Did you know anything about other people selling goods to him on credit, except what you heard?

A. No, sir. I remember one time he 'phoned down for a lot of goods and I told the clerk that answered the 'phone to tell him we could not sell him except for cash. One of the brokers was standing there and said he could not buy anything except for cash.

Q. That is what you heard from the broker?

A. Yes, sir; and Trotter's man told me so, too.

Q. Trotter's man and the broker stood there and told you that?
A. No, sir; just the broker stood there. He said he couldn't get credit anywhere; that he owed too much.

Redirect examination:

Q. When did Joe Dietzen die?
A. Two years ago this fall.
Q. Since his death, who has managed the affairs of your firm?
A. I have managed it—me and the bookkeeper.
Q. Prior to the death of Joe Dietzen, what part of the business had you looked after?
A. I was on the farm most of the time and attended to outside business.
Q. Where was that?
A. At Fort Negley, Ga.
Q. How long were you there?
A. Eleven years.
Q. When did you come back to Chattanooga?
271 A. I came back in 1901.
Q. Have you been actively identified with the business since that time?
A. Yes, sir.

And further this deponent saith not.

Sworn to before me this 25th day of November, 1903.

[SEAL.] BRUCE FORSHEE,
Notary Public.

EXHIBIT "A" TO DEPOSITION OF N. DIETZEN.

Merriam & Co. in account with N. Dietzen & Bro.

Summary.

1903.				
May 30th.	To Bal., per statement rendered.....		12.31	
	To Mdse. per Invoice Ren'd.			
	Note unpaid.....		300.00	
	" "		150.00	
	" "		261.55	
	" "		354.42	
	" "		158.29	
				1236.57

Merriam & Son, in account with N. Dietzen & Bro.

Credits.

Total amount credited on chg. sheet			830.53
Jan. 2nd.	Cash	$3.15	
17th.		1.75	
May 3rd.		18.78	
10th.		5.93	
16th.		7.48	
Apr. 3rd.		1.73	
21st.		13.39	
May 30th.	Mdse	2.00	
			54.21

272 Merriam & Son, in account with N. Dietzen & Bro.

Total	$842.05	
Less credits to Dec. 31st as per attached credit sheet.	830.53	
		$11.52

1903.

Jan. 17th.	Mdse	$1.78	
Mar. 3rd.		19.02	
10th.		6.03	
16th.		7.73	
Apr. 3rd.		1.80	
21.		13.64	
22nd.		.50	
May 8th.		4.50	
		$66.52	
Less 1903 credits		$54.21	
			$12.31

Deposition of N. H. Grady.

N. H. GRADY, the next witness called, being duly sworn, deposed as follows:

Examined by Mr. LANCASTER:

Q. Where do you live and what is your occupation?

A. I live in Chattanooga and am in the Insurance business.

Q. With what firm are you connected?

A. Glover and Grady.

Q. State whether or not I. B. Merriam, the bankrupt in this cause, is indebted to your firm in any sum, and if he was so indebted at the time of the bankruptcy, to what extent?

A. He is indebted to our firm for $100 or $125. In the neighborhood of $125.00.

Q. On what account is that indebtedness?

A. On account of insurance on the building which he occupied or which the firm of Merriam & Son occupied; part on that and part on the stock of goods of Merriam & Son.

273 Q. How old was the debt at the time of the bankruptcy?

A. Part of the debt was over a year old. The policies had run a year, I think, last January. Part of it was six or eight months old.

Q. State whether or not you made any effort to collect that indebtedness from Merriam & Son, and if so, what conversation, if any, did you have with I. B. Merriam with reference to that debt and the means by which he was to pay it?

A. I presented my account to Mr. Merriam a number of times in person. I went myself for the purpose of finding out what prospects he had for paying me. I knew that he was not in very good circumstances financially and I could see his stock was running down, and naturally I wanted to look after the account myself. I had perfect confidence in Mr. Merriam's integrity and relied upon his word. He assured me that I was not in any danger of loosing the amount of my debt, and frequently referred to the fact that he owned a half interest in valuable coal land up near Rockwood in this State, and that he had every reason to believe that he would be able to dispose of that land, and in the event he did dispose of it, he would be in good financial shape, and stated that he expected then to be able to take care of his debts. I distinctly remember one time when he said he expected to remain in business and stock up and go ahead. Relying on this statement, I let the matter drag along. I frequently called to see how he was getting along, and was assured from time to time that the trade would be consummated. I had every reason to believe that he would complete the trade at an early date and that my account would be then paid.

Q. Did he tell you in any conversation that he had given a secret mortgage on that land to his brother?

A. He did not.

Q. When did you first find that out?

A. After the bankruptcy proceedings.

Q. That was your first information?

A. My first information, yes, sir.

Cross-examination by Mr. SPURLOCK:

Q. What was the date of the insurance policies?

A. I do not remember, but by referring to the books I could give the exact dates, if it is material.

274 Q. About what was the date?

A. Part of the debt for insurance was on a policy that expired last January, and one of the policies was in November, I know, because I had recently renewed one policy for the First National Bank.

Q. What time was it you were having those conversations with Mr. Merriam?

A. From last January up to a very short time before the bankruptcy.

Q. Was that the time when you noticed the stock going down?
A. I had noticed that along for several months.
Q. What was the amount of his policy?
A. The amount of Insurance or the premium?
Q. The Insurance?
A. I cannot tell you exactly but can refer to the books if the matter is of any consequence. I think it was about $5,000 on the building and about $2,500 on the stock. It was somewhere in that neighborhood.
Q. Which was the latest policy?
A. I think the policies on the building were the latest. I am not sure, but I can furnish the exact figures from the books.
Q. Will you kindly furnish the dates and amounts of each of those policies and attach same as Exhibit "A" to your deposition?
A. I will furnish the amounts and dates of the policies and file it as exhibit "A" as requested.

And further this deponent saith not.

Sworn to before me this 25th, day of November, 1903.

[SEAL.] BRUCE FORSHEE,
Notary Public.

EXHIBIT "A" TO DEPOSITION OF N. H. GRADY.

Statement of indebtedness of I. B. Merriam to Glover and Grady at date of institution of Merriam Bankruptcy proceedings.

Premium on Policy No. 4743, German American, amount $3000, dated Jan. 2nd, 1902: expired Jan. 2, 1903.....	$24 00
Premium on Policy No. 3604, Hamburg-Bremen, amount $3000, dated Jan. 2nd, 1902: expired Jan. 2, 1903	24 00
275 Premium on Policy No. 2933, Continental, amount $3000, dated Nov. 30, 1902; expired Nov. 30, 1903	27 00
Premium on Policy No. 4988, German American, amount $3000, dated Jan. 2nd, 1903; expired Jan. 2nd, 1904...	27 00
Premium on Policy No. 3772, Hamburg-Bremen, amount $3000, dated Jan. 2nd, 1903; expiring Jan. 2nd, 1904..	27 00

All the above listed policies cover on the building at Nos. 819 and 821 Chestnut street, Chattanooga, Tennessee.

Indebtness of I. B. Merriam & Son.

Premium on Policy No. 1363, Hartford, amount $3000, dated Nov. 4th, 1902; expired Nov. 4th, 1903, and covering on stock of merchandise at Nos. 819 and 821 Chestnut street, Chattanooga, Tenn	34 50
Total	$163 50

Deposition of G. H. Jarnagin.

(Examined by Mr. PRITCHARD:)

G. H. JARNAGIN the next witness called, being duly sworn deposed as follows:

Q. State Mr. Jarnagin where you reside, and if you say in Chattanooga, state how long you have lived there?

A. I have been a citizen of Chattanooga since 1865.

Q. How long have you known I. B. Merriam?

A. Well now I have known him ever since he came here. The year he came here I don't remember, but he began business right next door to me. I would have to have some data with which to refresh my memory as to the year. He began business down there on Market street and, of course, I became acquainted with him soon after he came here.

Q. Have you at any time ever been associated with Mr. Merriam in any business?

A. Yes, sir, in the real estate business.

Q. You have never had any other business relations with him?

276 A. No, sir.

Q. State whether or not you and he were ever interested, and to what extent you were proportionately interested, in the lands spoken of in this record as the Cumberland County coal lands?

A. Well, we were equally interested, jointly and equally interested, in 10000 acres more or less of Cumberland County Coal land.

Q. Were you interested as partners, or were the interests individual and you were merely tenants in common?

A. We were interested as partners. The land was owned by us jointly.

Q. You owned a half interest and he owned a half interest?

A. Yes, sir, each of us owned a half interest. There was no partnership agreement.

Q. How long have you and Mr. Merriam owned this land or the principal part of it as tenants in common?

A. I don't remember the date of the purchase.

Q. Was it not about 1890?

A. Well, as an approximate basis, I should say it was about 1890.

Q. Had the lands been developed. That is, had there been any coal mining or coal mining operations conducted on the lands or had the lands simply been prospected for coal?

A. They had simply been prospected.

Q. During the time that you and Mr. Merriam owned the land as tenants in common, did he render any special services in connection with the lands any more than you did, in any way?

A. Well, I don't think he did. He may possibly have given a little more of his time to it.

Q. But as a matter of fact, when there was any important or

material business transactions to be conducted with respect to these lands, state whether or not you, and not Mr. Merriam was the principal person who attended to it?

A. Well, I think I was.

Q. In his deposition in this case, Mr. Thomas Merriam testifies in substance that I. B. Merriam rendered the principal services in connection with the lands, looking after them, making sale of them, etc., and that, in consideration of that fact, you had agreed that when the lands were sold I. B. Merriam would have the larger
277 part of the purchase money. State in the first place, whether the premises, namely; whether he had rendered greater services, existed; and second, whether any agreement or understanding was made between you and I. B. Merriam or anybody else, that when the lands were sold he should receive the greater part of the proceeds as compensation for his services?

A. Well, Mr. Merriam at different times mentioned to me that he had given more of his time and attention to looking after the land up there, and he mentioned to me on several occasions that he thought he should be compensated for the extra time he had given. I don't remember whether I ever agreed to that or not. I remember that I stated I had given it all the attention I could possibly give it; that it was not necessary for both of us to be there anyway.

Q. Was there any agreement between you that I. B. Merriam should receive more of the proceeds than you?

A. No, sir.

Q. When this trade or dealing for the lands was originally made between you and I. B. Merriam on the one side and Robinson and Thos. Merriam or Robinson representing himself and Thos. Merriam on the other side, do you recall what the consideration of the land was to be?

A. I think it was $150,000 if I remember correctly.

Q. Was that price subsequently reduced?

A. Yes, sir.

Q. To what sum?

A. It was reduced in the settlement we made of it. There was no agreement only when the property was sold. At that time a certain proposition was submitted which I accepted and it was a considerable reduction from the original price agreed on.

Q. State whether or not it was then agreed or understood by you that the reduction was exclusively on your part and that the price of the whole land was not reduced; that the price of your half should be reduced and Merriam's remain the same?

A. Let me answer that in my own way. In the first sale we had the consideration was $150,000. That agreement was reduced to writing and the papers were drawn and the contract and all the papers connected with it were all deposited in Syracuse, N. Y., in escrow. They remained there for some time and there was nothing done. Finally, Mr. Thomas Merriam of Syracuse,—I have forgotten whether he telegraphed or wrote,—anyway he said he
278 would give $45,000 and I accepted that by wire. I accepted that instead of the $75,000 on condition of an immediate set-

tlement being made. That was $45,000 cash and $20,000 stock in the company. That was the proposition I accepted and I accepted it by wire. That was in lieu of the original contract made prior to that time.

Q. When the wire or telegram or letter you speak of came, state whether or not the proposition covered both interests in the land whether it was the same for both interests, and whether or not it was accepted by you unconditionally and by I. B. Merriam conditionally to this effect; "Jarnagin accepts proposition, but Merriam accepts proposition made to him by Thos. Merriam at Rockwood," and state whether or not you knew then or knew afterwards, until the sale was closed, what the proposition made to I. B. Merriam by Thomas Merriam at Rockwood was?

A. I never knew what the proposition was. I dictated that telegram myself, but Mr. Merriam never told me what that proposition was. He never did tell me.

Q. Did you know what the proposition was?

A. No, sir, I did not.

Q. Did I. B. Merriam go in person to Syracuse, N. Y., to close up that trade?

A. He said he was going and left here for that purpose.

Q. When he went to Syracuse to close the trade, did he have any authority from you to modify or change the trade in any way, so far as your interests in the land were concerned?

A. No, sir, I gave him written instructions.

Q. I will ask you whether or not you gave him written instructions limiting his authority and only authorizing the deed to be delivered upon condition that your part of the consideration be separately paid and paid in cash or its equivalent and the delivery of stock according to the terms of the contract?

A. My instruction to Mr. Merriam was this; That he submit this proposition of mine to Mr. Merriam, to Mr. Thomas Merriam, and instead of being paid to I. B. Merriam, my part of the proceeds, the $45,000 should be remitted to me at once directly and not sent through I. B. Merriam. It was to come to me by mail or express, at their option, but not through Mr. I. B. Merriam.

Q. His powers then were limited powers and the deed was to be delivered only on the express condition that the consideration was to be paid as agreed upon?

279 A. Yes, sir.

Q. And paid to you and not to any other person?

A. That is right.

Q. Were those instruction- in writing?

A. My recollection is that they were. I am satisfied I instructed him in writing just what to do.

Q. Were those instructions carried out so far as you were concerned and you -are actually paid in that way for your interest in the lands?

A. Yes, sir, I was. The remittance came to me by mail.

Q. Going back of the actual sale: State whether or not the prin-

cipal body of those lands was covered by a mortgage for $4,000 to the Chattanooga Saving Bank?

A. Yes, sir, a mortgage of $4,000 had been given on the entire tract. It was given by I. B. Merriam and myself.

Q. Was that mortgage registered?

A Yes, sir.

Q. Was that the only mortgage on the land so far as you know?

A. So far as I know, it was.

Q. Did you know at the time you made the sale to Thos. Merriam and his associates that Thos. Merriam held a mortgage of $35,000 on the land or I. B. Merriam's interest in it?

A. No, sir; I did not. I never knew anything about that until I. B. Merriam returned here and told me that his brother had a mortgage on it. I knew he had personally borrowed some money from his brother before that, but that was the first I ever heard of a mortgage.

Q. I will ask you whether I. B. Merriam frequently, or otherwise, ever stated to you, or in your presence, or to your knowledge, that the sale of his interest in those lands would realize sufficient to him to enable him to satisfy the claims of all his creditors and leave a surplus to him?

A. Well, in the various conversations we had concerning the property, Mr. Merriam did state to me that if the sale was made, it would enable him to pay all his debts and leave him sufficient to continue his business; that is on the first proposition of $150,000. I don't know anything about the proposition made to him at Rockwood. I never could get him to tell me what that proposition was.

Q. Do you know from anything that occurred when the Rockwood arrangement between I. B. Merriam and Thomas Merriam was made?

280 A. The date of it?

Q. Yes, sir.

A. Well, it was some little time prior to the final settlement of the matter. I can only speak approximately, it may have been three or four months or possibly not so long.

Q. And it was that long before I. B. Merriam went to New York to close the deal?

A. Yes, sir.

Q. Do you know where the conference between I. B. Merriam and Thos. Merriam took place?

A. My recollection is, if I am allowed to state just what I. B. Merriam told me about it, that it was in Mr. Merriam's room in the Wright hotel. Where his room is, I don't know. I was here and Mr. Merriam was there; but the arrangement was made in Thomas Merriam's room in the Wright hotel.

Q. About the time the trade was closed, and at the time this telegram accepting the terms was sent to Thos. Merriam, did you ask I. B. Merriam as to what the arrangement between him and his brother as to his interest in this land was?

A. Yes, sir.

Q. Did he tell you or not?

A. No, sir, he did not.

Q. I will ask you whether or not that arrangement was kept secret?

A. Presumably it was.

Q. How did I. B. Merriam go and why did he go to Syracuse, N. Y., to close this deal?

A. How did he go?

Q. How did he come to go?

A. I don't know what prompted him to go, unless it was to effect a settlement. I wanted the matter settled, and in fact I dictated the telegram. Mr. Merriam then told me he was going on in person. I told him this: "If you go, you go at your own expense." I remember distinctly telling him that.

Q. Did you want him to go or insist on him going?

A. No, sir.

Q. In point of fact, did you know he was going until very shortly before he left?

A. It was possibly a day or two before he went. I know the question was raised very suddenly. It may possibly have been two days.

281 Q. Is it a fact that his going was very hurried and his determination to go only expressed a day before he left, and great haste was required to get up the papers in order for him to catch the train to get off that night?

A. I don't know about that exactly. There was some haste in his getting off and the preparation of the necessary papers.

Q. Was he or not very anxious to go in person and close the trade with his brother?

A. Well, he stated to me that he was going; that his interest demanded him to go.

Q. And you were not anxious that he should go, and was entirely willing that he should go?

A. Why, of course. If I remember correctly, I incidently stated to Mr. Merriam that I thought the matter could be settled without that expense; but he told me that it was necessary for him to go. I told him that if he went, it would be at his own expense; that I would not be a party to the expense incident to his going.

Cross-examination by Mr. SPURLOCK:

Q. You say that long before he made this sale he was indebted to his brother Thomas Merriam?

A. That was my impression, Mr. Spurlock. If you will just let me state it in my way. I was not interested and never asked about his private affairs, but he told me repeatedly that he was indebted to his brother. I of course did not know what sum and never asked him.

Q. You had no interest in his private affairs outside of this land deal?

A. No, sir. I never knew anything about the relation between his brother and himself more than just that he told me his brother had been aiding him.

Redirect examination:

WITNESS: In connection with the compensation of Mr. Merriam, I want to make this explanation: It was my purpose after we should have sold the land to compensate Mr. Merriam for the extra time he had given to it in excess of the time I had given in looking after the development and sale of the land. I will state, incident-ly that I was then connected with the City Savings Bank and could not go up there. I paid half of the expenses, but he gave more time to it than I did.

282 Q. As I understand it, there was no agreement but it was a purely voluntary matter?

A. Yes, sir; it was my intention to do that. But when the settlement was made, it wiped out every thing of that kind. I told Mr. Merriam that I would accept the proposition in lieu of everything; that he was to bring no claim against me for extra services, and he never has brought it or said a word about it. I told him at the time, "I don't care a snap about the arrangement you had with Thos. Merriam at Rockwood. I asked you what it was and you refused to tell me, and I am not going to insist on it. But now I accept this in lieu of all claims. There is to be nothing brought against me in the future. As for you, I don't care what kind of a settlement you make with your brother, Thomas Merriam."

And further this deponent saith not.

Sworn to before me this 27th day of November, 1903.

[SEAL.] BRUCE FORSHEE,
Notary Public.

Deposition of W. F. Kalb.

W. F. KALB, being called and duly sworn, deposed as follows:

(Examined by Mr. PRITCHARD:)

Q. Mr. Kalb, what business are you in and how long have you been in it?

A. I am manager of the branch office of R. G. Dunn & Company at Chattanooga, Tenn., which position I have held since November, 1887.

Q. Has I. B. Merriam been a resident of Chattanooga during all that period?

A. Yes, sir.

Q. Was he living here in 1897?

A. Yes, sir.

Q. As manager of R. G. Dunn and Company's establishment here, is it part of your duties to investigate the financial condition of people engaged in trade?

A. Yes, sir.

Q. Is it also a part of your duty, or do you visit places of business to see what amount of stock they carry from time to time?

283 A. Yes, sir.

Q. How often during the period you have mentioned have

you investigated the condition of I. B. Merriam, and how often have you visited his place of business?

A. I don't know about that. I probably have been over there not less than half a dozen times this year.

Q. And investigate his financial condition how often?

A. You might say on an average of at least twice a year. That is our regular rule.

Q. What has been his financial condition since 1887?

A. Well, that covers a period that is very hard to state about. Previous to 1896, Mr. I. B. Merriam was regarded as being responsible and his statement indicated he was worth from $50,000 to $75,000. Since 1896 much depended upon the sale of his interest in coal lands in Cumberland County, Tennessee as to what he might be worth. But the general impression seemed to be that he was responsible, and worth several thousand dollars clear of his liabilities.

Q. Was that upon the assumption that he could sell his coal lands?

A. Yes, sir.

Q. Did he have any other valuable unencumbered assets so far as you knew, except those coal lands?

A. I could not answer that question now, because there are so many pieces of property.

Q. Is the Cumberland County coal land of which you speak the same coal land in which Mr. G. H. Jarnagin is interested with Mr. Merriam?

A. Yes, sir.

Q. Now going back the last few years, I will ask you whether or not I. B. Merriam has been prompt or otherwise in the payment of his debts, and whether he has been a slow and difficult debtor out of which to realize?

A. Do you want me to answer as to I. B. Merriam and the firm too?

Q. Yes, he has testified that there is nobody interested in the firm but himself.

A. Mr. I. B. Merriam and the firm of Merriam & Son during the last few years have had the reputation of being very slow in their payments and in some quarters credit was refused them.

Q. Were numerous claims received during the last few years by R. G. Dunn & Company against Merriam & Son?

A. Yes, sir.

Q. What kind of a stock of goods has the firm been carrying during the last few years?

284 A. A small stock of goods. I could not state just how much.

Q. Has it been constantly decreasing and running down?

A. To all appearances it has.

Q. Was their business active, or did they not have any considerable trade or business?

A. Their business was rather an inactive one. The sales appeared to be falling off.

Q. For the past few years has R. G. Dunn & Company given the firm any commercial rating?

A. Yes, sir.

Q. What was it?

A. $35,000 to $50,000, with a limited line of credit, or a limited mark of credit you might say.

Q. Was that at any time withdrawn and instructions given to inquire?

A. No, sir; not until within a few days of the bankruptcy.

Q. Was that basis of credit given on the assumption that the Cumberland County Coal land was unencumbered or encumbered, and if encumbered, to what extent?

A. It was based largely upon what he would realize from a sale of his interest in the coal land, which I understood was encumbered to the extent of $4,000—the Sadd mortgage—that was the only one I knew about.

Q. State whether or not Mr. I. B. Merriam represented that property was unencumbered except as to $4,000?

A. That is my recollection.

Q. And such rating as he was given was made upon the faith of that representation as to the value of the property?

A. Yes, sir.

Q. Did you know or had you ever been informed by I. B. Merriam that Thos. Merriam held a mortgage for $35,000 on this property, which mortgage was unregistered?

A. No, sir.

Q. State whether or not you ever had any conversations, and if so, how often, with I. B. Merriam in which he stated in substance or effect that his Cumberland County property was sufficient in value to pay off his debts and leave him a margin besides, if sold?

A. On numerous occasions Mr. I. B. Merriam made the statement that he would realize sufficient from the sale of his interest in the Cumberland County Coal lands to more than pay his debts
285 and leave him considerable capital with which to operate his business.

Q. If a person interested in the financial condition of I. B. Merriam had been a subscriber to your agency, located, we will say, in Syracuse, N. Y., and desired any information concerning the financial situation of I. B. Merriam, could such subscriber have obtained it through R. G. Dunn & Co.?

A. Yes, sir.

Q. Assuming that Thos. Merriam is a subscriber to the agency of R. G. Dunn & Co., and assuming that Thos. Merriam is connected with one or more banks and manufacturing establishments, all of which are subscribers to R. G. Dunn & Co., books, would such subscribers be entitled to information concerning the solvency or insolvency of I. B. Merriam?

A. Yes, sir.

Q. Is it ordinarily customary for business men of average prudence to make inquiries through a commercial agency to which they are subscribers as to the financial condition of men or firms with whom they are dealing?

A. Yes, sir.

Q. If Thomas Merriam, or any other subscriber interested in the solvency of I. B. Merriam had at or about the time of his bankruptcy or within six months or a year therebefore, made inquiry through R. G. Dunn & Co., would you have been in a position to furnish him with the information touching his financial condition, and would you or not have reported that his solvency or insolvency depended on his interest in the Cumberland County Coal lands?

A. Yes, sir.

Q. State whether or not your report upon his condition would have shown the lands referred to as being unencumbered except for the $4,000 mortgage?

A. It would.

Q. I believe you stated that you had no information of a secret unregistered mortgage?

A. Yes, sir.

Q. And in no conversation did Mr. I. B. Merriam ever intimated that his brother held a secret mortgage of $35,000?

A. No, sir.

286 Cross-examination by Mr. SPURLOCK:

Q. In getting the amount of any man's rating, what inquiry do you usually make from him?

A. I generally call upon the party and endeavor to get a statement of his assets and liabilities, after which I make outside investigation and inquiries and then determine as to the proper capital and credit rating.

Q. And that appears in your reports just by certain signs or symbols does it not?

A. Well, Mr. Spurlock, the key is what you mean I suppose and that appears only in the reference books. There is a detailed report in each and every case and from that we take our data for the reference books. When there are any changes in the statements, they are transferred to the reference book.

Q. The rating you give is published, is it?

A. Yes, sir, it is published in the reference books.

Q. And that gives the name of the firm, the line of business, capital rating and the credit also does it not?

A. Yes, sir.

Q. But it does not constitute the details of your investigations and the items making the credits and liabilities?

A. No, sir.

Q. And that is merely indicated by signs?

A. Yes, sir. If an inquiry is made about the financial and credit standing of an institution, we answer that inquiry in detail as much as possible.

Q. Did you get from Mr. Merriam a statement of the liabilities and assets of which these ratings were predicated of which you speak?

A. Yes, sir. It is my recollection that the last statement we got from Mr. Merriam was about 18 months previous to the bankruptcy proceedings.

Q. Did that contain a statement of his assets and liabilities?

A. It contained a statement of his assets and liabilities as given by Mr. Merriam.

Q. At what amount did he state his assets?

A. I don't recollect. My best recollection is about $75,000; I think that was about his total assets.

Q. That was about 18 months before the bankruptcy?

A. Yes, sir.

Q. Did this statement contain a detailed and full list value of all his property or only the value of different pieces of real estate
287 over and above the encumbrances on it?

A. My recollection is the statement contained an itemized account of his business assets and outside real estate.

Q. And the amount of all that was $75,000?

A. In the neighborhood of $75,000.

Q. Do you remember whether in giving his real estate in and about Chattanooga, he estimated it at its full value, or did he give it with such equities as might be in it?

A. The full value.

Q. Did it show the mortgages on it?

A. My recollection is that it did.

Q. What was the value of his real estate over and above the mortgages?

A. I could not say *how*.

Q. Was there a value on his real estate over and above the mortgages?

A. My recollection is that there was an equity in the real estate.

Q. Of a considerable amount?

A. No, sir, not a very large amount I think.

Q. What did he give in the Cumberland County Coal lands at?

A. In the neighborhood of $50,000, that is, his net interest.

Q. And the other real estate at a small amount and the balance of the $75,000 was made up of what?

A. Of his accounts and bills receivable and his equity in the real estate.

Q. Have you that statement with you?

A. No, sir, but I suspect it is in the files of the office.

Q. You keep the statements here?

A. Yes, sir.

Redirect examination by Mr. PRITCHARD:

Q. What did that statment show Mr. I. B. Merriam's liabilities to be?

A. About $35,000 I believe, It may have been a little more.

Q. State whether or not this statement you refer to showed an indebtedness to Thos. Merriam of $35,000? Was there a debt of that kind to one man?

A. I have no recollection of it.

Q. The indebtedness according to your recollection was,
288 in the aggregate, about $35,000, if to that had been added the $35,000 due to Thomas Merriam, it would have left practically no margin of assets at all, or a very small amount?

A. I suppose not.

Q. He estimated his Cumberland County land at about $50,000 and the statement did not disclose a mortgage on that for $35,000?

A. I have no recollection of it.

Q. If it had, that would have reduced his interest in the land to $15,000?

A. Yes, sir.

Q. And this would have shown him to have been insolvent by some $20,000 or more would it not?

A. Yes, sir.

Q. Speaking of your reference books, Mr. Kalb, state whether or not it is the custom of R. G. Dunn & Co., to issue once or twice a year a large volume containing the names and ratings of people in trade and furnish or supply such books to its subscribers?

A. The firm of R. G. Dunn & Co., publish four times each year a volume containing the names of commercial people with a capital and credit rating in each case.

Q. That books if for general use and when specific information is desired, inquiries are addressed to one of R. G. Dunn & Company's agencies are they?

—. ——.

Q. And R. G. Dunn & Co.'s business is, then, to furnish information needed by people interested in persons in trade?

A. Yes, sir.

Q. What is the size of the books you issue?

A. There are three different sorts.

Q. The principal reference book, the large books you issue?

A. I have never taken a measurement of it. Its length is probably one foot and a half, width a foot and a quarter and it is probably four or five inches thick.

Q. How many columns of printed matter are there on a page?

A. About six is my recollection.

Q. Is it printed in small or large type?

A. Small type.

Q. How many names are contained in that book?

A. About 1,300,000.

Q. And in the front of the book is given an index or
289 key to the letter used after the names you indicate their rating?

A. Yes, sir.

Q. And that book is used as a basis for such inquiry as any person may desire to make as the standing of another individual or firm?

A. Yes, sir, and for further information that the book shows.

Q. And to obtain that information, you resort to these reports which you obtain from the individual himself and other necessary information?

A. Yes, sir.

Q. And that you are prepared to furnish subscribers?

A. Yes, sir.

Q. Please try to find, and if you find, file as "Exhibit A" to this

deposition, the last statement of I. B. Merriam's financial condition already mentioned in your deposition?

A. I will make search and file statement as requested.

And further this deponent saith not.

Sworn to before me this 27th, day of Nov., 1903,

[SEAL.] BRUCE FORSHEE,
Notary Public.

The following was read and treated as a part of the deposition of W. F. Kalb, being his directions to the stenographer before his above deposition was taken.

Mr. Kalb a day or two after his examination, stated that he wished to change certain portions of his deposition, and at his request, I noted the following changes in his cross-examination.

Q. Did you get from Mr. Merriam a statement of the liabilities and assets on which these ratings were predicated of which you speak?

A. It is my recollection that the last statement we had from Merriam & Son was on or about the month of November, 1900, since which times I have had numerous conversations with Mr. I. B. Merriam and, in a general way, he has always assured me and given me to understand that his assets and liabilities were the same as stated in November, 1900.

Q. At what amount did he state his assets?

A. $214,000.

Q. At what amount did he state his liabilities?

A. At $75,000.

290 Mr. Kalb then requested that I change the figures he had formerly given as the assets of Merriam and Son, to-wit, $75,000 to $214,000 wherever they appeared in his deposition, and that I change the amount of liabilities to $75,000 wherever he had given the figures $35,000.

[SEAL.] BRUCE FORSHEE.

EXHIBIT "A" TO DEPOSITION OF W. F. KALB.

Rev.

Merriam & Son, Whol. Grocers, Chattanooga, Tenn.

I. B. Merriam, about 61, married.
Frank G. Merriam, about 30, married.
61 years 23 Nov. Hamilton Co.
3-9600, Nov. 23, 1900. 619, 621 Chestnut st.

The- submit the following written and signed statement:

Assets.

Stock of merchandise	$18,000.00
Good outstanding accounts	30,000.00
Good bills receivable	3,000.00
I. B. Merriam's individual property:	
City Savings Bank stock and 8,000, worth	$2,500.00
Two lots on Long street	1,000.00
Two lots on William street	500.00
Business property (occupied by firm)	27,500.00
160-acre farm near Cleveland, Tenn	1,000.00
100-acre farm near McDowell	500.00
Twelve lots in Sherman Heights	2,500.00
Thirty-five lots near Citico Furnace	3,500.00
Homestead property on Vine street	10,000.00
Lot on Georgia avenue	1,500.00
Twelve lots in Hill City	3,000.00
40-acre farm in Alabama	500.00
34 lots between Montgomery, Rossville and East End avenues	12,000.00
Six lots on Rossville and Montgomery avenues	12,000.00
One-half interest in 10,000 acres land in Cumberland County, Tenn.	75,000.00
291 Flat and three dwellings on Rossville avenue	7,500.00
Firm cash	750.00
Lot on Market street	2,500.00
	$214,750.00

Liabilities.

Of the firm	$37,000.00	
I. B. Merriam, individually	39,500.00	
		$766,500
		$138,250

MERRIAM & SON.

(Here follows deposition of Byron E. Tatum. Filed April 15, 1904.)

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

In re I. B. MERRIAM, Bankrupt.

Petition of H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM ET AL.

The deposition of Byron E. Tatum, taken on behalf of the petitioner in this cause, at the office of Williams & Lancaster, Temple Court, Chattanooga, Tennessee, on the 21st day of December, 1903, by consent of the parties, in the presence of Robert Pritchard and George D. Lancaster, attorneys for petitioner, and A. W. Chambliss, attorney for defendant, Thomas Merriam.

The signature of the witness is waived.

The said witness, being first duly sworn, deposed as follows:

(Examined by Mr. LANCASTER:)

Q. What is your business or profession, Mr. Tatum?
A. I am a lawyer.
Q. Where do you reside?
292 A. At Jasper, Marion County, Tennessee.
Q. How long have you been engaged in the practice of your profession?
A. Thirteen years, I believe; either thirteen or fourteen years.
Q. Are you acquainted with I. B. Merriam, the bankrupt in this cause?
A. I am.
Q. How long have you known him?
A. I have known him slightly for twenty years, and in a business way since 1899.
Q. State whether or not you, as a lawyer, had in your hands for collection any claim or claims against I. B. Merriam, and if so, when you got these claims and what claims they were?
A. In the spring of 1899, as I now remember, Mrs. S. O. Vann of Jasper put in my hands for collection notes against Mr. Merriam amounting to something near $7,000—possibly a little more than $7,000, but of that I am not sure.
Q. For what length of time did you hold those notes for collection?
A. From the time they were put in my hands up to the time he went into bankruptcy.
Q. Do you know the origin of those claims and how old they were when so put into your hands?
A. They were more than twenty years old. Mr. Vann, the hus-

band of Mrs. Vann, was a partner in business with Mr. Merriam and died some twenty odd years ago, owning at the time of his death a half interest in the business. Then the business was conducted one or two years or possibly three years, in the name of Merriam & Vann, at which time Mrs. Vann's interest was purchased by Mr. Merriam, he owing her at that time some $13,000 or $14,000, as I remember, and he executed his notes for the amount he owed Mrs. Vann, and from time to time during the last twenty years he has paid these notes down to the amount of the notes which was placed in my hands for collection. I know these facts from having talked with Mr. Merriam and from the information furnished me by Mrs. Vann.

Q. Now please state, Mr. Tatum, the efforts you made to collect this debt after it was placed in your hands, and what you
293 found during the time you had this debt for collection was the financial condition of Mr. Merriam and how it was in a general way that you were *pur*suaded to carry this debt for so long a time?

A. Immediately after the notes were placed in my hands for collection, none of them being secured, I came here to Chattanooga to see Mr. Merriam, and told him I held the notes for collection. He said he could not pay the notes immediately; that he had at that time some coal lands in Cumberland County, I believe, and he was then on a trade for this property, and if he could sell them, and he thought he would in a short time, he would then be able to pay this indebtedness. I came back to Chattanooga after that time and did not get to see him; I was told he had gone out to these lands. When I did see him again, I insisted that if he could not pay the notes, that he renew them and secure them. He owed Mrs. S. O. Vann in her individual capacity some $3,100 or $3,200, and he owed her as guardian for three of her children some $3,900 at the time I took the notes. After some correspondence and several trips here in person, I arranged with Mr. Merriam to renew the notes he owed to Mrs. Vann as guardian for her children, and he gave a mortgage or deed of trust on certain real estate in Chattanooga to secure these notes—there were three of them. I believe these notes were to be two years after date, and the deed of trust was given on this Chattanooga property to secure them. The note he owed Mrs. Vann individually was renewed for a few months without any security. Just the time of this I do not now remember. The note that fell due first, the one going to her, was not paid at maturity. I kept after him, both by correspondence and seeing him at his place of business, and urging him all the time to pay that note, and he would say from time to time that he had his coal deal almost completed, and that he would pay the note as soon as the coal deal went through. Time was extended on this note from time to time, and finally, when I saw I could not get any money out of him on it, I got him to give a second mortgage or deed of trust on the same property I had the first deed of trust on, and he included a little property in Hill City not included in the first deed of trust. I saw him often after the note became due and urged him to pay it, but he would always put me off, saying he could not pay it until he sold his coal lands; that he could pay it then and

would do so. Now, from the time I first took these matters in hand up to the time he went into bankruptcy, I saw him a great
294 many times and had several letters from him, and I never saw him when he did not promise to pay when the coal deal went through. The coal deal was almost ready to close up on all these occasions, according to what he would say. I don't think I ever received a letter from him that he did not mention this land deal and say he would pay up when it went through.

Q. Do you recollect about what date the first mortgage was given you?

A. It must have been in May, 1899; I don't remember positively, but it was somewhere along that time.

Q. Do you recollect about what date the second mortgage was given?

A. Not having the mortgage before me now, it would be impossible to give the exact date, but I think it was given either in January or February, 1900. Now, that might possibly have been January or February, 1901, I am not sure, but I can furnish the dates if desired.

Q. What representations, if any, did Mr. Merriam make you in reference to the condition of this Cumberland County coal property, as to whether or not it was encumbered, and if he made any representations along this line, state how frequently he made such representations and up to what time?

A. After I had had these two claims in my hands for collection for some time, and had been unable to get him to pay them, and unable to get property that I thought was sufficient security for them, I insisted (and this was before the last mortgage or deed of trust was given) that he gave me a mortgage on the coal lands so often spoken of. This he refused to do, stating that it would hinder the sale of the coal lands; that this was only a comparatively small debt, and in that same conversation he said the coal lands were encumbered with something like $4,500, as I now recollect, and that was for part of the purchase price of some of the land, or a renewal of the notes that had been given for the purchase price. He said to me many times after that when I asked him to give me a mortgage on the coal lands that he would not do it; that the lands were unencumbered except as to the $4,500, and said he would not encumber them further.

Q. Did he make representations of this kind during the years 1902 and 1903, prior to his bankruptcy?

295 A. He made those representations to me just a few days before he left for New York to close up the deal. He said then that the land was unencumbered except for the $4,500 or some such amount, and that when he sold the land he would be able to pay all his debts. He wrote me letters, or one letter at least, in which he said the lands were worth $100,000 more than he had told me before. He often said he would have more than enough to pay all his indebtedness. I insisted on his getting the money and paying this small amount to Mrs. Vann and he said that his credit was not

good at the banks; that he had been in debt so long and owed so much that he couldn't go to a bank and get money. He also told me his brother in New York was carrying him along and he owed him, and I asked him to get the money from his brother and pay me. He told me this year—early in the year—when I asked him to get the money from his brother, that his brother would not carry him any further; that it was costing him a great deal then to have surveys made and having the work done necessary to sell these coal lands, and his brother would not put up any more money for him. I threatened to foreclose the deeds of trust I had if he did not pay. I was trying to get him to pay part if not all of this indebtedness, and I did get from him some $300 or $400 or $500 all told up to the time of his bankruptcy.

Q. What did you find in the course of your investigations concerning the affairs of I. B. Merriam in your efforts to collect these matters in regard to the financial standing and credit of I. B. Merriam in this community?

A. I talked to a number of business men here after these notes were placed in my hands, to learn his financial standing, and I also wrote to R. G. Dunn & Co. for a report on him. Mr. Kalb, the manager of Dunn's office here, for some courtesies I had extended him, had told me that at any time I needed a report I could get it. I got this report from him at the time I got these matters for collection, and it showed that he owed a very great deal; it showed that he was considerably involved; it showed that his property was worth a good deal, but I reached this conclusion: that he was of very doubtful solvency. This report was written on thin tissue paper and I think I have it in my office now, and if you wish I will file it as an exhibit to my deposition.

Q. If you have in your possession any letters you received from I. B. Merriam in reference to the claim of Mrs. Vann, and
296 copies of letters you wrote him in reply to these letters, I will ask you to file them as exhibits to your deposition.

A. I have some 22 letters that I received from Mr. Merriam, and these letters I file as exhibit "A" to my deposition. I have also 15 copies of letters written by me to Mr. Merriam concerning these claims. I will not undertake to say, and in fact I know, that these letters do not cover all of our correspondence. In the first place, I don't think I kept copies of all the letters I wrote him, and I know I have some letters from him which I have not with me today. However these copies of my letters I file as Exhibit "I

Q. I notice from the record in this bankruptcy cause that Mr. Merriam, the Bankrupt, on examination was questioned concerning certain letters that he had written you in reference to this Vann debt, and that there is filed as exhibits to his deposition in this cause letters purporting to have been written by him to you, bearing dates as follows: March 31st, 1903; another letter July 11th, 1900; another letter Nov. 30th, 1900; another letter bearing date of April 11th, 1900, another of July 7th, 1900; another Oct. 31, 1900; another Dec. 3rd, 1900; another Nov. 5th, 1900. I hand you herewith exhibits in question and ask you to state whether or not you received

these letters from Mr. Merriam, and whether or not you will file these as Exhibit "C" to your deposition when we obtain an order from the referee to remove them from the original file and make them exhibits to this file?

A. I received the letters mentioned in your question from Mr. Merriam and produced them in the bankruptcy proceedings and questioned Mr. Merriam concerning them, and he admitted that he had written each and all of them, and I will file them as Exhibit "C" to this, my deposition, when the order mentioned is obtained.

Cross-examination.

By Mr. CHAMBLISS:

—. Mr. Tatum, you collected from Mr. Merriam interest on these claims which you held, suppose?

A. I don't think he ever sent me any of the interest. If he did it was a very small amount. He paid the interest monthly to Mrs. Vann direct, and I think he paid the interest up to the time
297 he went into bankruptcy or shortly before.

Q. He had also paid you your counsel fees for looking after these claims?

A. He paid part of them, and part of them he did not.

Q. Do you recollect how much he paid you on that account?

A. I do not now remember exactly, but I can give in detail to the best of my recollection what I have gotten out of it.

The notes given to Mrs. Vann as guardian, provided on their face for attorneys' fees at the rate of 10 per cent. as I now remember it. I charged him at the time he renewed these notes, and gave the deed of trust to secure them, 7 per cent., I think. I charged him nothing for the other note at the time it was renewed. Then, when the note owing to her was renewed the second time, I charged him another fee and that was either five or seven per cent. Seven per cent. was the most I ever charged him when the notes said on their face 10 per cent.

The notes were renewed and extended several times, after that, sometimes for six months and sometimes for three months. I asked him one time to pay me my fee for collecting them as a renewal, and I think that is the only fee I got out of him—those three times. He gave me his note for another fee, but I never got it, and I think I got some $600 or $800 out of him.

Q. Both of these claims, the one payable to Mrs. Vann personally, and the one payable to her as guardian, were secured by mortgages upon Mr. Merriam's real estate, were they not?

A. I finally succeeded, as I said, in getting him to give deeds of trust on certain of his property for the purpose of securing them. The property, however, was not worth the amount of the debts, at least it didn't bring it at the sale or anything like it.

Q. Has the property been sold?

A. It has been. I sold the property as Trustee under the deed of trust. The court refused to keep us in court and allowed us to sell

the property claiming there was no equity in the property for the creditors.

Q. Without giving an accurate description, will you please state what that property embraced?

A. Yes, sir; it consists of three lots on Montgomery Avenue. These lots are unimproved and are small; also 27 lots in what is known as Curtis' Addition. Of these 27 lots there were six
298 or eight lots that could be sold for something like $200 apiece; and the remainder are so situated, there being a great hole or ditch through them, and being subjected to overflow at high water, that I doubt very much if they will bring any price scarcely. I have been trying to sell them, but so far have been unable.

Then there were 7 lots across the river in Hill City; they practically had no value.

Q. Have you any idea, from Merriam, or otherwise, what the property cost him?

A. He said to me on various occasions that they cost him what seemed to me to be fabulous sums, $15,000 or $20,000.

Q. The lots in Curtis' Addition and on Montgomery Avenue are all in the city, are they not?

A. Yes, sir; they all border on the bound-ry.

Q. Mr. Merriam represented to you that if he could sell his coal property he could pay himself out of debt entirely?

A. Yes, sir; on many occasions, both by conversation and by letter, as some of his letters that I have filed here will show.

Q. Did he indicate what price he expected to get for the coal property?

A. Yes, sir; at first he thought he would get $75,000 for his part; but he told me shortly before he left for New York to close the deal that he would not get quite that amount; that he was going to have to take some coming to him in stock. He wrote me a letter, one of the letters I have filed here dated in March—also stating that he would have to take part of the purchase price in stock, but that the stock was good and that he could surely pay his indebtedness. I talked with him here the day before he left for New York—I think it was the day before—and he said that he would be able to pay all his indebtedness when he returned.

Q. Did you see him when he returned?

A. Yes, sir; I saw him a few days after he returned, and he said he could not pay his indebtedness; that he has to take some in stock and that he had to pay his brother what he owed him—that his brother kept that out. So, in place of paying Mrs. Vann what he owed her, and what he agreed to pay, he *payed* me $250.00 for her two or three days before he took the bankrupt law.

Redirect examination:

Q. You say you saw Mr. Merriam the day before he left for New York to close the deal?
299 A. As I now remember it.
Q. What was his apparent mental condition at the time?

Was he happy and pleased over the prospect of the sale, or otherwise?

Q. Well, he seemed to be thoroughly satisfied; he created that impression on me. He said he would be able to pay all his debts when he got back, and I thought he would.

Q. He promised to pay you as soon as he returned?

A. Yes, sir.

Q. And you saw him after he returned?

A. Yes, sir; a few days after.

Q. What was his mental condition at that time?

A. He seemed to be very much worried, and he got mad at me when I talked with him over in his store on this occasion.

Q. What reference did he make with reference to his brother taking the money, or what excuse did he offer?

A. He said he had been forced to take a large amount of stock and pay his brother a large amount. He said he was doing the best he could, and that he would pay $250 on that day which was all he could then do. I was an endorser on a note he owed me then, and he was very particular that the Vann note be credited with that $250, and that it should not be applied to the note of mine which was then due, or would be in a few days—notice had been given.

Q. When did I. B. Merriam first tell you that in making sale of this property he would have to take part of the purchase price in stock?

A. As I now remember, it was some time either in February or March of this year.

Q. Did he tell you in that conversation how much stock he would have to take?

A. I am not positive; he either did then or after he came back. I rather think it was after he came back, but he may have told me before. Yes, I believe he told me in the beginning. I know he told me he was going to take considerable stock and possibly he told me the amount.

Q. After his return did he tell you what had been done with the stock he received as part of the purchase price?

A. Yes, sir; I think he did. I think he said he had hypothecated it—said he had transferred it.

Q. To whom?

A. To his brother I think.

Q. Thomas Merriam?

A. Thomas Merriam.

300 Recross-examination:

Q. Mr. Merriam always protested to you, did he not, that the claims of your clients were fully secured by these mortgages?

A. Do you mean he always claimed the property was worth the indebtedness?

Q. Yes.

A. Yes, sir; he always claimed the property would bring three or four times the amount; but I knew it would not, and I knew that he knew it wouldn't. I talked to a good many business men about

it and they knew better, and I told Mr. Merriam that the lots would never bring it.

Q. But that was his contention?

A. He would argue that, yes, sir.

Q. He would argue it?

A. Yes, sir; and would go ahead to tell what great prices he paid for it. I told him he bought the property in boom times, and that the value of property had depreciated since then.

And further this deponent saith not.

Sworn to before me this 21st, day of December, 1903.

____ ____,

Notary Public.

EXHIBIT "A."

CHATTANOOGA, TENN., *Oct.* 31*st*, 1899.

B. E. Tatum, Jasper, Tenn.

DEAR SIR: Your letter is received. I am surprised with its tone. I wrote to Mrs. Vann and explained to her the reason I did not send her the money. I was called away from home, and as soon as I got back I sent the check. I expected she would write me when she wanted the money, and I wrote her that I instructed Frank to send her the check as soon as he heard from her, and on my return I found the letter from you. I wrote her at once and wrote her to confer with you supposing this was satisfactory all round.

I explained to her I was on a deal for my land, and would pay the note as soon as I made the deal. I don't see what you people want. Just as I am about to get able to pay you, to now give me trouble. I supposed the check was satisfactory as I fully
301 explained to Mrs. Vann, and I intended the letter to answer yours, and the money was received and we have paid the check.

Now, Mr. Tatum, I did not intend to in any way treat you or your letter in any trifling way, but supposed my letter to Mrs. Vann was satisfactory to you. I have done everything to satisfy you and Mrs. Vann. I can't pay the note now, but fully believe I can before the 1st, of Jan. I can't see what more I can do You had better call and see me before you proceed further, I believe we can arrange matters satisfactory. Law will not pay me or any one. I have done what is right, and the best I could.

Yours, I. B. MERRIAM.

CHATTANOOGA, TENN., *Apl.* 10, 1900.

B. E. Tatum, Jasper, Tenn.

DEAR SIR: Your letter received in reference to the Mrs. Vann note. I am not ready right now to pay the note, but expect to be in a short time. Mrs. Vann wrote me last fall that she did not want the money then, but would want some for Charley to go to school

with this spring. I would like to renew the note for sixty or ninety days or six months if she had rather loan it for that time.

You can write me or come over if you think best.

Yours, I. B. MERRIAM.

CHATTANOOGA, TENN., *Apl.* 21, 1900.

B. E. Tatum.

DEAR SIR: I send you note signed as requested, and also note to you for thirty days, five per cent. this is what you charged me before and it is all I can pay. This certainly should satisfy you, it is all the First National pay Wheeler and McDerment for collecting where they have to bring suit, it is all any lawyer charges here for a large note like this. I certainly should not had this to pay if Mrs. Vann had even hinted to me she wanted a new note or it paid, but not a word has she written me about it.

Yours, I. B. MERRIAM.

302 CHATTANOOGA, TENN., *July 9th,* 1900.

B. E. Tatum.

DEAR SIR: Your letter is received. I want this note extended 90 days, in that time I have not any doubt but what I can pay it. I see I can't do any better now. I have other real estate, and could give a mortgage, but I prefer to pay the note, but can't do so under 90 days. The way it looks now you can do this and be perfectly safe. You confer with sister and I think she will be willing to do this.

Yours, I. B. MERRIAM.

P. S.—I paid $15,000 for the property you mention. You have a mortgage on these lots besides that is worth nearly $5,000 *dollars.* What more do you want of a man.

CHATTANOOGA, TENN., *Dec. 13th,* 1900.

B. E. Tatum, Att'y at Law, Jasper.

DEAR SIR: I send you our check for $5.00 as requested. We did not understand this matter, will you give us particulars of the case? Have we any chance to get anything, etc.

Yours, MERRIAM & SON.

CHATTANOOGA, TENN., *Feb. 12th,* 1902.

B. E. Tatum, Jasper, Tenn.

DEAR SIR: Your letter came last week and as I have been to the coal land I have not answered before, I will be over to see you next week. If you are in town call and see me.

Yours, I. B. MERRIAM.

303 CHATTANOOGA, TENN., *Feb.* 19, 1902.

B. E. Tatum, Jasper, Tenn.

DEAR SIR: As to the payment of the notes. It will be impossible for me to arrange the payments under sixty days or ninety days. I

would go and see you to-day or to-morrow, but I am to see some eastern parties about the coal land to-morrow. If you will be here this week I will confer with you, if not, I will go to see you Saturday or Monday. Write me when I can have a conference with you.

Yours, I. B. MERRIAM.

CHATTANOOGA, TENN., *June 5th*, 1902.

B. E. Tatum, Jasper, Tennessee.

DEAR SIR: I send you note for $65.00 and check, with but little interest on note. We are making good progress in selling land. We are sure to close soon, not longer than sixty days. If you will use this note it will be a great accommodation. Do so, and oblige,

Yours, I. B. MERRIAM.

CHATTANOOGA, TENN., *June 12th*, 1902.

B. E. Tatum, Jasper, Tenn.

DEAR SIR: I send note as requested as security, have been away from home.

Yours, I. B. MERRIAM.

CHATTANOOGA, TENN., *Aug. 30th*, 1903.

B. E. Tatum, Jasper, Tenn.

DEAR SIR: I send a renewal for note with interest. I will be able to pay this when due as I have practically sold my coal prop-
304 erty. We will not get a payment until Nov. 1st. I made a very good sale, carry me until that time and I will be all right.

Yours, I. B. MERRIAM.

CHATTANOOGA, TENN., *Sept. 2nd*, 1900.

B. E. Tatum, Jasper, Tenn.

DEAR SIR AND FRIEND: I have been so busy with the coal deal that I have neglected every thing else, I send you my note for $100, no interest, use this for me and I will sometime pay it all back.

I got a copy of the report made on my land, the report is first-class, and I will soon get the deed through. I will send sister a check Monday. I will always send a check before the month is out.

Yours, I. B. MERRIAM.

CHATTANOOGA, TENN., *Sept.* 24, 1900.

B. E. Tatum, Jasper, Tenn.

DEAR SIR: We can let Mrs. Vann have $300 by the 20th, of Oct., and before if she needs it, just let us know two days before she has got to have it. Of course, it would suit us better to pay all at once, as soon as our trade *it* through, but if it will help her we are willing to do as we state.

Yours, I. B. MERRIAM.

CHATTANOOGA, TENN., *Sept. 27th*, 1902.

Mr. B. E. Tatum.

DEAR SIR: Your letter is received. I should have sent the money when I said I would, but I had some money to pay out that I was not looking for. I enclose check for $100. I will send sister her check. I never have failed to pay her interest monthly in years.

Yours, I. B. MERRIAM.

305 CHATTANOOGA, TENN., *Nov. 11th*, 1902.

B. E. Tatum, Jasper, Tenn.

DEAR SIR: I have been away or this would have been attended to before. I am at work on the coal deal and hope it will soon be closed. Please accept this renewal, and oblige.

Yours, MERRIAM & SON.

CHATTANOOGA, TENN., *Nov. 27th*, 1907.

B. E. Tatum, Jasper, Tenn.

DEAR SIR: I send you note with interest for note due the 28th. I now believe I will be able to take care of this when due. Trade is progressing with coal land.

Yours, I. B. MERRIAM.

CHATTANOOGA, TENN., *Dec. 3rd*, 1902.

B. E. Tatum, Jasper, Tenn.

DEAR SIR: Your letter is received, and I also got a letter from my brother, stating that he would make the coal trade; had already considerable of the capital raised, and wanted me to go to the mines at once and attend to some business, so I will have to leave in the morning. I send you a note which we will pay when due. You must use this as I will have to be away a number of days.

We arranged some matters yesterday which will be five thousand dollars to us. Use this note and I assure you it will be paid at maturity.

Yours, I. B. MERRIAM.

CHATTANOOGA, TENN., *Jan. 5th*, 1903.

Mr. B. E. Tatum, Jasper, Tenn.

DEAR SIR: In regard to note of $67.94 held by you against Mr. I. B. Merriam. He requested us to write you, he is now in Cumberland County. He was there a great part of last week. He is
306 expected home about Thursday. He requested me to write you that on his return he will attend to this paper immediately. Hoping this is satisfactory,

Resp't, MERRIAM & SON.

CHATTANOOGA, TENN., *March 4th*, 1903.

B. E. Tatum, Jasper, Tenn.

DEAR SIR: I have been expecting to hear from my brother or I should have written you before, as I told you the last time I saw you

that I depended on the sale of my property to make the payment to Mrs. Vann that you desired. I think I have the reputation for fair dealing, and have done everything I could to hurry up the trade, the delay hurts me much more than it can you. You told me when I saw you at the hotel last summer you would do all you could to help me in this matter. Since that time I have paid you one large fee to settle and now you want another. I am not made of money, but I wish to do what is right, and my conscience is clear before God in reference to Mrs. Vann's claim against me.

If I, like some parties, would have protected myself behind the law, which would have saved me many a struggle.

I don't wish to have any one suffer on my account. The land is sold, and I am trying to get the deal closed, but the parties are taking their time, I now believe that within 15 days I can pay Charlie's note and will do so before, if possible. I have to take a part in stock, but the stock will be good. Mrs. Vann will get in time, every cent I owe her. I never had but six thousand dollars from Mrs. Vann and the estate. I have paid her about twelve thousand, and still owe her as much as I ever received.

Who could have done better by her than I have. I have served her as well as I could my own sister.

I did not ask Mrs. Vann to take the notes from your hands. I have heard some very strange things, but I never have given them any credit, but always treated you with courtesy as her attorney.

If you come to town come and see me. You wrote you would see me in a short time, do so and I think we can arrange matters.

I don't wish to have any trouble, but if it has got to come, I shall do what is right in the matter.

Yours respectfully, I. B. MERRIAM.

307 CHATTANOOGA, TENN., 3–12, 1903.

Mr. E. B. Tatum, Jasper, Tenn.

DEAR SIR: In regard to the note you hold against us that was due on the 11th of March. Mr. Merriam is at Zone, on Cumberland Mountain at present, and will give the matter attention when he comes back, which will be Saturday or Monday.

Very Respectfully, MERRIAM & SON.

CHATTANOOGA, TENN., *July* 28, 1903.

B. E. Tatum, Jasper, Tenn.

DEAR SIR: I sent Mrs. Vann her interest to day, I wrote her I would always send her interest before the 1st of the month.

I expect to get news of the close of the coal land this week. I think this is the way to get quick money as the land here recently sold for much — price. I will write you or Mrs. Vann as soon as I get news from New York. I think you should protect me in this matter, do so, and oblige,

Yours, I. B. MERRIAM.

CHATTANOOGA, TENN., *April 3rd*, 1903.

B. E. Tatum, Jasper, Tenn.

DEAR SIR: I send you a check for Charley as you requested. I am now expecting the northern parties the last of next week, I had a letter from them to-day.

Yours, I. B. MERRIAM.

CHATTANOOGA, TENN., *May 24th*, 1899.

B. E. Tatum.

DEAR SIR AND FRIEND: I send you note and check. The train is about to leave.

Yours, I. B. MERRIAM.

308 EXHIBIT "B."

JASPER, TENN., *May 23d*, 1899.

Mr. I. B. Merriam, Chattanooga, Tenn.

DEAR SIR AND FRIEND: Enclosed you will find note made out to be signed by you, $3,161.41 for Mrs. Vann, dated May 16th, 1899. I date this as it is in order that it may bear the same date as the other notes. Of course you are to pay the same rate of interest on this note that you agreed to pay on the others. As I understand it all the interest on all the notes was paid up to the first of this month.

You can just enclose check for Mrs. Vann to me for interest on the three notes from May 1st to 16th (if this is the proper date), which will be $9.75, and one for the note of $3,161.41 for same time, which will be $7.90. Then the interest will fall due hereafter on all the notes on the 16th of each month. And it would be on the three notes $22.77 and on the one note $18.44, making a total monthly payment of $41.21. Trusting that this will be satisfactory in every respect, I am,

Respectfully, —— ——.

JASPER, TENN., *March 6th*, 1903.

Mr. I. B. Merriam, Chattanooga, Tenn.

DEAR SIR: Your favor of the 4th inst. received and contents carefully noted.

You state in your letter that I promised you at the hotel last summer that I would do all I could to help you and that since that time you have paid me a large fee to settle and that now I want another. It is true that I told you that I would do what I could to help you, but you are very much mistaken about having paid me a large fee or any other fee since that time and you are also very much mistaken when you say it is the fee that I am trying to get now. I did not intend neither did you understand that I would try to help you to the prejudice of the interest of my client. I have never yet undertaken such a thing.

You also state in your letter that you did not ask Mrs. —
309 when I read it. You also state that you have heard some very strong things, but never have given them any credit, but always treated me with courtesy as Mrs. Vann's attorney. I haven't the least idea what you mean by the insinuation in that statement. I don't know what "things" you have heard and much less do I care. I know full well that I have attempted to discharge my full duty towards Mrs. Vann in this matter and have a consciousness of having treated you very considerately from the first day these notes were placed in my hands until this time. I have never made you pay the fees that I could have.

—— ——.

JASPER, TENN., *March 3d*, 1903.

Mr. I. B. Merriam, Chattanooga, Tenn.

DEAR SIR: We wrote you on Feb. 26th as we thought rather an important letter asking for check and have not heard from you as yet. We can not understand the delay.

You will please pardon us for observing that we are very greatly surprised at the course you have pursued in trying as you have to have Mrs. Vann take her business out of our hands. We frankly submit that this is about the first time that we have ever known or heard of a business man resorting to such methods. This is especially true in view of the fact of the very great consideration we have shown you since these matters have been in our hands.

Please let us know by return mail whether you will arrange to pay off this note now or shall we proceed to sell enough of the property under deed of trust to collect the note.

As we have often said we have not the slightest desire to do you any injustice or to put you to any inconvenience whatever, but we have a duty to perform to our client and after having waited all these years we have decided that there is no reasonable excuse for any further delay.

Most respectfully,

—— ——.

310 JASPER, TENN., *Feb. 26th*, 1903.

Mr. I. B. Merriam, Chattanooga, Tenn.

DEAR SIR: The last letter we had from you, which was some five or six weeks ago, you were asking for a week or ten days more time to pay off one of the Mrs. Vann notes. You said you expected to get an answer from your coal people during the week in which the letter was written. We have waited patiently. I have just received instructions from Charlie and Mrs. Vann to proceed with this matter. Charlie is badly needing some of his money now and will have to have some in a few days or leave school.

We have no desire whatever to do you any injustice, but there must be a payment on these matters of at least as much as the note going to Charlie, which note, as you remember, is for the sum of $1,301.27, together with $130.12 attorney fees. You will please send

us check covering this amount not later than the first day of March. If not we will proceed to sell enough of the property to pay at least this much of the debt.

Most respectfully,

—— ——.

JASPER, TENN., *Feb. 3d*, 1902.

Mr. I. B. Merriam, Chattanooga, Tenn.

DEAR SIR: Since my arrival home I have seen and talked with Mrs. Vann in regard to the notes I have for collection against you and she has instructed me to collect them at the earliest possible date that I can possibly do so. Of course she is very anxious that I be able to collect them without causing you any embarrassment.

Charley has as you know reached the age of twenty-one and Mrs. Vann is exceedingly anxious to comply with the law and make her final settlement as his guardian. In order to do that it is absolutely necessary that you pay off the note she holds against you as his guardian.

I therefore suggest that you make arrangements to meet this note say by the 15th of this month and we will then hold up on you a short time if necessary for the other matter. This note as you know amounts to $1,301.27 and together with $130.12 attorney's
311 fee (these notes as you remember call for an attorney's fee of ten per cent.), making a total amount to take up this note of $1,431.39.

Hoping that you will be able to send me check covering this amount not later than the 20th at the outside, I am most respectfully,

Your friend,

—— ——.

DEC. 1ST, 1900.

Mr. I. B. Merriam, Chattanooga, Tenn.

DEAR SIR: Yours of the 30th ultimo to hand and contents carefully noted. I have carefully studied your proposition and I do not believe it would be right or proper for me to accept it for Mrs. Vann. Since you are so confident of an early consummation of your trade and are so able to pay your debts I will make this suggestion: That you borrow a sufficient sum to pay off this note from some one else. I take it that you would not have any trouble in negotiating a loan.

To show you that I do not want to put you to any extra expense in this matter I will say this: that in event you decide not to borrow the money but prefer to give real estate securities that I will pay myself out of my fees the amount necessary to stamp the notes and pay for the registration of a mortgage. I only make this proposition, Mr. Merriam, that you may thoroughly understand that I have no desire to put you to any extra cost and that all I want is to put this matter in a businesslike shape. Of course if I were consulting my own personal convenience it would be less trouble and work to me to agree to wait on you another thirty days. My fees would be just the same and the work much less, but I don't believe it would be proper for me to do this. Please let me hear from you to-day stating which course you would pursue.

Most respectfully,

—— ——.

Nov. 28th, 1900.

Messrs. I. B. Merriam & Son, Chattanooga, Tenn.

Dear Sirs: You will remember that you told me some three or four weeks ago that you would leave in a day or two with
312 the parties to show them your coal fields and that you expected to close out your deal within a very short time and that upon your return you would write me definitely about the Mrs. Vann note which I held for collection. I have failed to receive any letters from you up to this time.

Mr. Merriam, I must say that this note can not and will not remain open in its present shape. This money must be paid or the matter put in some proper business shape. As before stated to you we all know that it is not good business to leave matters of this kind as this is and I can not feel that I have done my duty to Mrs. Vann as my client as long as this note is left in its present condition. Of course I know that your intentions to pay this note are perfectly good and I have but little doubt that if it was left in its present condition but that it would be all right, yet I know that good, common sense and business principles require that this note be either paid or the debt properly secured and one of the two must be done immediately.

Most respectfully, —— ——.

Nov. 2d, 1900.

Mr. I. B. Merriam, Chattanooga, Tenn.

Dear Sir: Your favor of the 31st was duly received and contents carefully noted. You say you were surprised at the tone of my letter. I can not now remember anything in my letter that should have surprised you. At least I only intended to write you a straightforward business letter. Mrs. Vann sent for me yesterday to inform me that she had received a letter from you regarding this matter. She states to me that she is very anxious that I do nothing that will in anywise embarrass you or your credit. Yet at the same time she says that she is not willing to let this matter run longer in its present condition. I will be frank with and say that I have not advised her that it would be proper for her to allow this note run as it is without security, for I know, as every other business man does know, that men can not borrow money in so large a sum as this and carry it for so long a time without the same is secured. It would not be business to do so. It seems that the only immediate — of your having a great deal of money depends upon your coal land deal, so often referred to in the past, and yet seems to be as far in the
313 future as it was 18 months ago when Mrs. Vann first put the notes in my hands. The fact is, to be plain with you, I am afraid you will not sell your coal lands as soon as Vann to take the notes from my hands. I read your letter to Mrs. Vann and if you did not ask her to take the matters out of my hands I can not understand English you hope to.

Mr. Merriam, I want to say again, as I have often said, that I have not the least desire or inclination to do you any financial injury.

On the other hand, it would afford me pleasure to render you any assistance in my power consistent with my duty to my client. In other words, I do not desire to bring any suit against you to collect this note, but if you feel so sure that your coal land deal will be made within the next sixty days you might easily borrow this sum of money from some one else and take up this note. Hoping to hear from you at once in a substantial way, I am,

Most respectfully,

—— ——.

JASPER, TENN., *Oct.* 23*d*, 1900.

Mr. I. B. Merriam, Chattanooga, Tenn.

DEAR SIR: Yours of the 22d inst. with check for $300.00 was duly received. I gave the check to Mr. Tatum this morning and asked him to credit the note with the amount.

I was very anxious to have this amount on the 10th of this month. It is entirely too late now to use this money as I expected to use it. I asked Mr. Tatum some time early in Sept. to get $300 for me by the first of Oct. He said he wrote to you several times and finally went to Chattanooga to see you and came back and told me that it would be here on the 10th sure and that he had agreed to some extension of time on the note on the condition that you——

JASPER, TENN., *Oct.* 19*th*, 1900.

I. B. Merriam & Sons, Chattanooga, Tenn.

DEAR SIRS: Your note of $3,161.41 due Mrs. Vann three months from April 16th, 1900, which was extended three months,
314 is past due according to the extension and is now in my hands for collection. Please arrange to pay some at once, together with my fee.

According to a proposition I made you had you sent $300 on the 10th of this month the time on this note would have been extended for sixty days and as you did not see proper to take advantage of that proposition I have been instructed by Mrs. Vann to proceed to collect the amount. You will therefore please send me check for the $3,161.41, the principal of the note, and one month interest due thereon of $22.13 and my fee for collecting of $316, making a total of $3,499.53. Hoping to hear from you at a very early date, I am,

Most respectfully,

—— ——.

OCT. 31ST, 1900.

Messrs. Merriam & Son, Chattanooga, Tenn.

DEAR SIR: I wrote you on the 19th inst. relative to your note of $3,161.41, in favor of Mrs. Vann, and up to the present date I have received no reply from you. It strikes me that it is a little strange that a business letter of so much importance would not as much as call for an answer, especially from business men.

On the 22nd inst. Mrs. Vann handed me a check for three hundred dollars from you which I promptly credited on your note.

The three hundred dollars which you agreed to send upon the 10th was never received, hence any proposition for a further ex-

tension of time upon your note will not now be considered. Mrs. Vann was exceedingly anxious as I told you in person for $300 on that date and was so anxious for it then that I agreed for her in event you paid it on the 10th promptly to some extension on your note.

We have been trifling with this matter now longer perhaps than we should have been and I as a business man, deem it necessary to take immediate steps to collect this note and will accordingly proceed at once to do the same. As I have often said to you I have no desire whatever to do anything that will embarrass you in a financial way and on the other hand it will afford me great pleasure to do anything I can, consistent with my duty to my client, that
315 would assist you in any way. I know and you know that my first duty in this matter is, and should be, to faithfully represent my client. And this I must and will do. We all know that money in this large amount cannot be had by any business firm without the same is well secured.

I think that I gave you a statement of the amount due on this note in my letter of the 19th inst. Hoping to receive check from you at once covering the full amount together with the unpaid interest and the fees for my collection, I am,

Most respectfully, —— ——.

(Ex. "B" 12.)

JASPER, TENN., *Sept. 20th*, 1900.

Mr. I. B. Merriam, Chattanooga, Tenn.

DEAR SIR: As you know according to the terms of the agreement the extensions on your note will make the same due some time next month. Mrs. Vann is very desirous of having a payment of three hundred dollars made on the note at once or within a few days. She has a place where she thinks she can use this amount to advantage.

Please write me at once if it will be convenient for you to make a payment on that amount within the next ten days.

Most respectfully, —— ——.

Ex. "B" 13.

JULY 14TH, 1900.

Mr. I. B. Merriam, Chattanooga, Tenn.

DEAR SIR: Yours of recent date duly received. I have talked with and advised Mrs. Vann that it would probably be better for her and quite an accommodation to you if we would agree to extend your note ninety days and she has finally consented that I write you that we do extend it for ninety days. This is done on the theory that you will pay off the note at the end of the ninety days.

Most respectfully, —— ——.

316 Ex. "B" (14).

JULY 9TH, 1900.

Mr. I. B. Merriam, Chattanooga, Tenn.

DEAR SIR: Your favor of the 7th relative to the Mrs. Vann note duly received. I think you are mistaken when you say that I said we would accept the mortgage on the 27 lots. I have no doubt but that property is worth as much as the two debts and perhaps said that to you. Yet I do not want and would not recommend that Mrs. Vann accept a second mortgage on that or any other property to secure this note. I take it that you will have no trouble in giving a mortgage on other real estate to secure this note or perhaps, it might suit you better just to go to the bank and get a sufficient amount of money to pay off this note for there is little doubt from what you say but that you will sell, your coal lands in a very short time.

I have the note with the instruction either to collect it, or get good security when it is due. Of course it will afford me pleasure to do anything in my power, consistent with my other duty to my client, to accommodate you in any way.

Most respectfully, B. E. TATUM.

Ex. "B" (15).

I. B. Merriam, Chattanooga, Tenn.:

I have seen and talked with Mrs. Vann in reference to the renewal of the note and I enclose a note to be signed by you herein and secured by you for three months providing that the interest be paid at the end of each month and also providing for fees etc. She understands that we will place this note in the bank at South Pittsburg before it is due and you pay it there and if you decide that you would rather extend the loan that you are to renew the note at the time it comes due and give us approved security of course in renewing th-s note now you are to pay my fees which the note I have calls for, my fees or $316.00, you can just send me check for this amount along with the new note. I hope you will get the matter arranged and not have to be at the expense of paying fees again on this matter, you will also send check payable to Mrs. Vann for $18.44 the one month interest due on the note April 16th, the date the new note bears.

317 Hoping the matter will be settled without giving any trouble or further embarrassment.

I am, Resp't, B. E. T.

Ex. "B" (16).

APRIL 10TH, 1900.

Messrs. I. B. Merriam & Son, Chattanooga, Tenn.

DEAR SIRS: I have in my hands for collection your note of $3,161.41 payable to Mrs. S. O. Vann. The note was due Nov. 16th,

1899, and is therefore almost six months past due. As you know the note provided for Attorney's fees in case of collection by Attorney.

If you will write me what day it will suit your convenience to arrange this matter, I will come up to see you.

Hoping to hear from at an early date, I am,

Most respectfully, —— ——.

Ex. "B" (16).

You are a business man and know or should know that usually when attorneys have placed in their hands notes for collection that they charge the fees allowed by law when the note is collected or when it is renewed. We have renewed or extended the time on these notes many, many times and never charged you any fee at all. And the times we have charged you for renewal and securing we charged but little over half of the amount we were entitled to and have usually carried those matters in the Bank for quite a time. I make these statements in view of the fact that you write quite a lengthly letter going over your great kindness to Mrs. Vann and that you all seem to think, or at least write, Mrs. Vann, that about all we are after is the fees we might make out of this, not that our kindness towards you or your former kindness towards Mrs. Vann have anything to do with the present statute of this business.

You say you are looking for your brother in a few days. Do you mean by that that when he comes you can get the money from him to pay off at least one of these notes? If that is what you mean, and you know that you can do this within a few days we would prefer not to proceed to sell any of the property. But if you do not know that you can raise this amount of money in a very short time
318 we will just proceed as before stated. Let us hear from you *oa* once.

Most respectfully, —— ——.

Exhibit "C."

Chattanooga, Tenn., *March* 31, 1903.

B. E. Tatum, Jasper, Tenn.

Dear Sir: I received a letter from my brother that he would be here on or about the 10th, of April and settle for the land.

The reason for the delay was this, his partner, Mr. Miller was to see me the day after I saw you, we both went to the land, he had an engine- from Knoxville and we had our engine-, he had examined the titles to his satisfaction but had come to the conclusion that the land must be measured and he must have a new map. We had already had the County surveyor of Cumberland county survey the land about two years ago, but he insisted on a proof measurement by both engine-s, or go over the lines of the whole property, the engine-s were two weeks in doing this and making the map. They now write as soon as the map is received they will come here and

then we will get the matter closed, the map was sent them last week, as soon as I can get this land sale closed you will get the money. I will push the sale and settling up as fast as I can.

Yours, I. B. MERRIAM.

Ex. "C" (3).

CHATTANOOGA, TENN., *July 11th,* 1900.

B. E. Tatum, Jasper, Tenn.

DEAR SIR: I am ready to give real estate securities on Mrs. Vann's note according to agreement. If you are not willing to extend time. As I wanted to pay the note when I sold the coal property, I supposed you and Mrs. Vann would both be willing to extend me that favor.

Yours, I. B. MERRIAM.

319 CHATTANOOGA, TENN., *Nov. 30th,* 1900.

B. E. Tatum, Atty. at Law, Jasper, Tenn.

DEAR SIR: Your letter received yesterday, I appreciate your position fully. As I told you my New York parties came and I showed them the land and their expert has made his report and reported favorable. He stated to me it was the best piece of coal land he had ever examined, and that he had been at it for years. I have a proposition from them that we may accept, but this will take at least 60 days time as a part of the Company are English parties.

We have a man here at Chattanooga that with some New York parties want the land. He puts in fifty thousand dollars, he had just told me that he can get his deal through in thirty days, as he has been on the land and has Mr. Browing now sinking a shaft and Mr. Browing has already made his report and it is very favorable, as I saw the report. Now I will make this proposition to you. If I don't get this deal through so I can pay you the money in thirty days or satisfy you it will come soon. I am willing to give you good security on real estate I have that is good for the debt.

It is so expensive giving deeds of trust now, stamps, etc., that as I believe I am so near selling my coal property that I dislike to give mortgages. You know how this is I am worth besides what I owe, at least one hundred thousand dollars, and Duns agency, after a close examination give me about that, but my property is largely in real estate. It takes my credit largely to keep any business agoing. All of this I give you in confidence as I wish to explain matters to you. Trusting that this will be satisfactory to you, I remain.

Yours, I. B. MERRIAM.

CHATTANOOGA, TENN., *April 11th,* 1900.

B. E. Tatum, Jasper, Tenn.

DEAR SIR: Your letter received, if I had been expecting Mrs. Vann wanted this money I would have arranged to have paid it.

I make this proposition: I will give Mrs. Vann my note for
320 90 days and then pay a part of it or the whole, and then secure the balance not paid. I have just paid some money

I might have paid her. I have just been to Philadelphia to sell my coal land, I will get about $75,000 (seventy five thousand dollars) out of it. You are perfectly sure of the money all in 90 days. Mrs. Vann is perfectly safe. If I had known she wanted the money, I would have paid her a part. I bought out my partner as you know, and it took considerable money. Arrange this for me this way, and oblige.

Yours, I. B. MERRIAM.

CHATTANOOGA, TENN., *July 7th*, 1900.

B. E. Tatum, Jasper, Tenn.

DEAR SIR: The note is due the 20th. I will give security in real estate. You said you would be willing to take security on the 27 lots for her note. I had rather let it run 90 days longer, and I believe that I can pay the note. We have a sterling offer on one-half of the coal land of $85,000, but we are trying to get some parties to take the whole track, if we fail in selling the whole we shall let one-half go.

We have given until the 1st of Sept. for the parties to take the whole track. If you can see your way clear we had rather wait a little longer as we wish to pay out of debt. Let me hear from you.

Yours, I. B. MERRIAM.

CHATTANOOGA, TENN., *Oct. 31st*, 1900.

Mrs. S. O. Vann, Jasper, Tenn.

I received a letter from Mr. Tatum to-day stating that he was going to sue the note. Now this would for your interest, be the worst thing you can do as it would injure my credit, and I could not pay as well as I can otherwise. I never have yet been sued for a debt. I have two dollars for every one I owe and will now in a short time be able to pay you. I now expect within 60 days to have my land sold and the money. If the note is sued it will take some time to collect it as it will put me in a position so I can't borrow money and injure my credit so I can't do business.

321 Look at the matter in the right light and withdraw the note from Mr. Tatum's hands.

Yours, I. B. MERRIAM.

CHATTANOOGA, TENN., *Dec. 3rd*, 1900.

B. E. Tatum, Jasper, Tenn.

DEAR SIR: I received your letter after the train left Saturady.

I have some real estate here I can give a deed of trust on, but prefer waiting a short time to see what I can do, this is the best I can do now, but believe in a short time I will make my trade through. I trust you will wait as I request.

Yours, I. B. MERRIAM.

CHATTANOOGA, TENN., *Nov. 5th*, 1900.

B. E. Tatum.

DEAR SIR: Your letter received. As to our selling the land the N. Y., parties start to-morrow night for Richmond. We meet them

there. You say we have been talking about selling for some time; the railroad has not been finished only a short time. If New York parties don't take the land we have a Chattanooga man that takes one fourth interest, and he has some New York parties that will take the balance. We now have three parties that want the land. The option runs out the 8th, on the first parties. The second say they will take the land at once if the first don't come to-morrow, the first party have already had their expert engineer on the ground. I will write you as soon as I get back from the land, the man that buys the land comes with his expert. As to the matter, if you see a reasonable chance to now push this claim you are on the ground, we will leave it with you.

Yours, MERRIAM & SON.

322 (Here follows affidavits of E. J. Page & Frank Spurlock, filed May 27, 1904.)

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM ET AL.

Affidavit of E. J. Page.

E. J. Page, being duly sworn, deposes that he is a member of the firm of King, Waters and Page, of Syracuse, New York, regular counsel of the defendant, Thomas Merriam, now deceased, and as such counsel drafted the answer filed in this cause on Aug. 1st 1903.

After the original bill in this case was filed by the Trustee, affiant had a conference with Thomas Merriam for the purpose of obtaining such information as was necessary to prepare his answer, at that time, and for some time previous, said Thomas Merriam was in a delicate state of health, and the conference with him was not as thorough as it would otherwise have been, and as would have been necessary if an answer under oath had been required. This was some time after there had been a settlement between Thomas Merriam and his brother, I. B. Merriam, and the surrender to the latter of the $35,000 note, which was secured by the deed of trust upon the coal lands sold to Thomas Merriam.

The said note of $35,000 and the deed of trust securing same had been at this time, as affiant was informed, filed by I. B. Merriam with the referee in bankruptcy at a meeting of the creditors of the said I. B. Merriam after the filing of his petition.

Affiant was informed by Thomas Merriam that at the date of the settlement between him and his brother, he held a note for $35,000, which was secured by the deed of trust, and understood that the note and deed had been executed and delivered on or about April, 1899; whereas, in fact both the note and deed of trust were executed in Sep-

tember 1897, and the note was then delivered and the deed of trust to Thomas N. Merriam, the trustee named therein, but the deed was not actually delivered to Thomas Merriam, the beneficiary, until 1899. These are the facts as learned by affiant at the time of the taking of the deposition of Thomas Merriam in this cause. Affi-
323 ant also received the impression that prior to the execution of the deed of trust securing same, and confused with his time, a previous deed executed in 1897 securing an indebtedness to Thomas Merriam of $25,000, and it was so stated in the answer filed in this cause, affiant is satisfied, from the statements made by Thomas Merriam in his deposition, that he misunderstood the said Thomas Merriam as to the date of the execution of the note for $35,000, and the deed of trust securing same, and confused with his time, the time when Thomas Merriam visited Chattanooga in 1899 and was shown the deed of trust which was then, as he is informed, in the possession of the trustee, Thomas N. Merriam. Affiant further states that it was not until quite recently, and since the death of Thomas Merriam, that his attention was called to the discrepancy between the date of the deed of trust securing the $35,000 note, and the date as stated in the answer drafted and filed by him. He was present at the time the deposition of Thos. Merriam was taken, in which he deposed about the execution of the deed of trust, but affiant had himself then forgotten the statements of the answer in regard to the deed of trust, and had no occasion to refer to the answer at that time, or since, until recently, and after the argument of this cause. Affiant cannot recall the statements made to him by Thomas Merriam about the execution of the deed of trust for $25,000, if any such were made, but from the circumstances under which the answer was prepared, and the subsequent statements of Thomas Merriam in his deposition, he believes that the statement to this effect in the answer was due to his misunderstanding of what was said to him by Thomas Merriam at the conference aforesaid.

E. J. PAGE.

Subscribed and sworn to before me this 26th day of May, 1904.
[SEAL.] O. E. COLLVILLE,
Notary Public.

H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM ET AL.

Affidavit of Frank Spurlock.

Frank Spurlock, being duly sworn, deposes that he is a member of the firm of Brown and Spurlock, and as such has had the active management of this cause, and has taken most of the proof therein.
324 He further states that he was present at the creditors' meeting when the note for $35,000 due from I. B. Merriam to Thomas Merriam, dated September 24th, 1897, and the deed of trust

securing same, were filed by I. B. Merriam with the referee in Bankruptcy, and then examined said papers.

He was present also at the taking of the depositions of Thomas & I. B. Merriam, but the discrepancy between the date of the deed of trust securing the $35,000 note, as stated in the answer, and the actual date, was never in any manner, as he recalls, called to his attention until during the argument of this cause.

FRANK SPURLOCK.

Subscribed and sworn to before me this 26th, day of May 1904.
[SEAL.] O. E. COLLVILLE,
Notary Public.

My commission expires April 14, 1906.

(Here follows suggestion of death of Thomas Merriam by his executors, Filed May 27th, 1904.)

H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM ET AL.

In this case come Ephriam J. Page and Robert C. Markert, and suggest to the court the death of the defendant, Thomas Merriam, since the hearing of this cause, and thereupon move to be admitted herein as defendants, as executors of the last will and testament of the said defendant, Thomas Merriam, and file herewith a certificate of their appointment as such executors by the Onondaga County Surrogate's Court, of the State of New York; and they further move that the answer heretofore filed in behalf of Thomas Merriam be amended of record so as to correspond with the proof on file in this cause, and so that their answer will aver as follows:

That the deed of trust executed by I. B. Merriam, to secure the note of $35,000 which was dated Sept. 24th, 1897, was of even date with said note, and also dated September 24th, 1897, and was
325 the only deed of trust executed by I. B. Merriam to secure the indebtedness due from him to Thomas Merriam in June, 1903.

KING, WATERS & PAGE,
BROWN AND SPURLOCK,
Sol's for Defendants.

Amendment allowed and petitioners admitted as defendants.
CLARK, *J.*

The People of the State of New York to all whom these presents shall come, send Greeting:

Know ye, that at Syracuse, in the County of Onondaga, on the 23d day of May, in the year of our Lord one thousand nine hundred and four, before Hon. Edgar P. Glass, Surrogate of said county, the last will and testament of Thomas Merriam, deceased (a copy of which is hereto annexed), was proved and is now approved and al-

lowed by us; and the said testator, at or immediately previous to his death, having been an inhabitant of, or having left assets which then were or have since come within the said County of Onondaga, by reason whereof the proving and registering of the said will, and the granting administration of all and singular the goods, chattels and credits of the said testator, and also the auditing, allowing and finally discharging the account thereof, do belong unto the Surrogate of the said county; the administration of all and singular the goods, chattels and credits of the said deceased and in any way concerning his will is granted unto Robert C. Markert and Ephraim J. Page, the executors in the said will named, they having first taken and subscribed an oath or affirmation, faithfully and honestly to discharge the duties of such executors; hereby requiring them to make or cause to be made a true and perfect inventory of all and singular the goods, chattels and credits of the said testator within a reasonable time and return a duplicate thereof to our Surrogate of the County of Onondaga within three months from the date of these presents; and if further personal property or assets of any kind not mentioned in any inventory that shall have been so made shall come to their possession or knowledge, to make or cause to be made, in like manner, a true and perfect inventory thereof and return the same within two months after discovery thereof, and also to render a just and true account of administration when thereto required.

In testimony whereof, we have caused the seal of the Surrogate's Court of the County of Onondaga to be hereunto affixed.

326 Witness, Hon. Edgar P. Glass, Surrogate of our said County of Onondaga, at Syracuse, in said county, the 23d day of May, A. D. 1904.

EDGAR P. GLASS, *Surrogate.*

STATE OF NEW YORK,
Onondaga County, Surrogate's Office, ss:

I, M. M. Mora, Clerk of the Surrogate's Court of the County of Onondaga, New York, do hereby certify that I have compared the annexed copy of letters testamentary in the matter of the estate of Thomas Merriam, deceased, with the original record thereof, as recorded in the Surrogate's office of said county, in Book "AA" Letters Testamentary, page 408, and that the same is a true and correct transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed my seal of office, at the city of Syracuse, in the County of Onondaga, New York, this 24th day of May, A. D. 1904.

[SEAL.]

M. M. MARA,
Clerk of the Surrogate's Court.

(Here follows "Decree *vs.* Thos. Merriam, Est.; and Order of Reference. Filed July 2d, 1904.")

H. F. ROGERS, Trustee, etc.,
vs.
THOMAS MERRIAM ET AL.

In re I. B. MERRIAM, Bankrupt. No. 517.

Be it remembered that this cause came on to be heard on this, the 19th day of July, 1904, before the Hon. C. D. Clark, Judge, etc., upon the pleadings, proof, stipulations of parties, together with the briefs and arguments of counsel for the complainant and defendant.

From all of which, the court is of opinion, and so adjudged, that at the time of the sale and conveyance by I. B. Merriam, the bankrupt, of his Cumberland County coal lands to the defendant, Thomas Merriam, he, the said bankrupt, was and had been for several
327 years insolvent; and that this insolvency was well known to the defendant, Thomas Merriam, the vendee of the land in question.

It is therefore adjudged and decreed that the appropriation of the proceeds of said sale by said vendor and vendee to the payment of the debts due by the former to the latter, or upon which the latter was endorser for the former, constituted an unlawful preference contrary to the terms and provisions of the bankrupt law, and said payments are therefore set aside, and the proceeds of said sale are hereby ordered to be paid over to the complainant as trustee for the benefit of the creditors of said I. B. Merriam, to an amount necessary to satisfy their allowable claims and the costs of the proceedings.

It is further decreed, for reasons assigned in the opinion of the Court, that the defendant, Thomas Merriam, had no right to appropriate any part of the proceeds of said sale to the payment of the unregistered mortgage for $35,000.00, and set up and relied upon in the answer filed in this cause.

And it further appearing to the court that since the hearing of this cause, the said defendant, Thomas Merriam, has died, leaving a last will and testament, and that there have been appointed thereunder, as executors of his estate, E. J. Page and Robert C. Markert, and that said executors have appeared herein and submitted to the jurisdiction of this court, and agreed that such decree as the court might have pronounced in favor or against the said Thomas Merriam, if he were still alive, may be pronounced in favor of or against them, as such executors.

It is therefore ordered, adjudged and decreed that this cause be referred to D. L. Grayson, as Special Master, to hear proof and report:

1. What debts have been filed against the estate of said bankrupt which have been allowed, or are allowable, as valid claims against said estate.

2. What amount it will be necessary for the executors aforesaid to pay into court out of the proceeds of said sale to satisfy said claims

Said master will give notice to each party to the suit of the time

and place of taking proof and make his report to this court at as early a day as possible. He will also report what was I. B. Merriam's part of the amounts due T. A. Wright and the Chattanooga Savings Bank, herein decreed as prior and valid liens on the Cumberland county coal lands, at the time of their sale.

Enter this,

CLARK, *J.*

328 (Here Follows "Opinion of Court," Filed July 15, 1904.)

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

In the Matter of I. B. MERRIAM, Bankrupt. No. 517.

In this case it will go quite beyond the limits of anything which its final disposition of by this court requires to enter upon a discussion of the facts in detail. It is altogether sufficient for counsel and others immediately concerned in the case that I should announce quite briefly the conclusions at which I arrive in regard to the questions of law and fact from a study of this record.

Now, first in regard to the facts, I conclude that there is no reason to doubt that the vendor of the tract of land conveyed in this case at the time of such conveyance, and for a long time prior thereto, several years, was insolvent; that he was decidedly so in fact at the time of the conveyance, and that this insolvency was well known to his brother, the vendee of the land in question, to say nothing of his having the most ample reasonable cause to believe that his brother was insolvent.

The firm stand which the vendee brother took in regard to the disposition which should be made of the proceeds of the sale, namely, that those proceeds should first go until all debts for which he was in any way liable should be satisfied cannot be reconciled at all with the view that he did not understand that his brother was at that time hopelessly insolvent.

In regard to both the vendor and vendee, and the question of insolvency in fact, it is appropriate to remark in passing that every man is conclusively chargeable, as a matter of law, with such knowledge and such belief as a reasonably sensible and reasonably prudent man ought to know under the given circumstances of the case, and under the circumstances of this case no reasonable man of ordinary intelligence, to say nothing of extended business experience, could possibly fail to know that the vendor at the time of the conveyance in question and long before that, was insolvent.

Aside from this, the other circumstances and the previous dealings and discussions of the vendor's situation clearly establishes the same proposition of fact.

In view of this conclusion of fact, it seems to me hardly open to doubt or question, that, with the exception of the mortgage,
329 presently to be considered, the vendor's part of the amount due Wright and the vendor's part of what was due the Chat-

tanooga Savings Bank, the remainder of the entire payment of this tract of land just as made and applied by the vendor and vendee constituted an unlawful preference under the bankruptcy law, and was clearly in contravention of the express provisions, and still more of the policy of that law, and that such payments must be so held and set aside.

And in regard to this particular point in the case, it should be remarked that both these parties are held, as matter of law, conclusively to contemplate just such a result as is the natural, necessary and probable consequence of their transaction, and of what they did. It is idle for parties to a transaction to say that they do not know or believe what all reasonable and intelligent men must know and believe, or that they did not intend or contemplate what all reasonable men of intelligence must have contemplated as the necessary and inevitable consequence of what is being done. The law could at any point be defeated and nullified if this were permitted.

With regard to the vendor's one-half of the debt due to Wright as a balance of purchase price, and the like one-half of the debt due to the Chattanooga Savings Bank, which was a lien on the land, I have no doubt, and do not understand it to be controverted that the payments to -his extent went to discharge valid liens upon the property, and these two payments were, of course, good.

It only remains now to dispose of the contention over the $35,000 mortgage, and indeed this has been the main and closely contested point in the case.

The difficulty on this branch of the case grows out of that provision of the bankruptcy law which undertakes to preserve and make good in the distribution of the assets every mortgage or other lien which is valid under the law of the State, and the contention in regard to this mortgage is that although it had never been recorded at the time of its payment, but had been kept secret and in a safe for something like six years, that it was nevertheless a valid lien as between the parties, and as to all persons except a judgment creditor.

It is not insisted and could not be, of course, that the land was not at any time subject to be taken under execution, or attachment, and subject to sale by the vendor to any innocent purchaser, but the contention is that as the lien, although secret and unrecorded, was good as between the parties and against creditors who had fixed
330 upon the property no lien by levy or by judgment, its payment immediately before filing the petition in bankruptcy was the satisfaction of a valid lien and was an act equivalent to registration, or foreclosure of the mortgage, and that although within four months preceding bankruptcy, was good.

Such a transaction there can be no doubt, broadly speaking, contravenes that equal distribution of the assets of an insolvent which it was the purpose of the bankrupt act of 1898 to secure.

This, however, can be legally and successfully accomplished in any case where the lien, although secret, is good under the State law, because, as stated, under such circumstances it is recognized as valid under the bankrupt act.

But the mortgage here in question is presented to this Court for a consideration in a somewhat peculiar aspect, as the mortgage had never been recorded and was presumably unknown to the Trustee in bankruptcy, or to creditors.

The petition in this case was brought to have set aside and annulled the preferential payments made out of the proceeds of this particular sale of land, upon the ground that they gave the vendee creditor Merriam an unlawful preference over other creditors of the vendor Merriam, and the conveyance and payments are assailed upon other grounds.

No notice is taken in the bill, or could have been taken, of the existence of this secret mortgage, which had not been put of record, although executed about six years before.

On the contrary the vendor during this interval of time, after the execution of this mortgage had repeatedly represented to creditors, in answer to inquiry, that this land was not incumbered by mortgage, or lien, and that it was open and free to creditors and sufficient to pay his debts.

These representations are clearly established in the evidence of the creditors, and that creditors extended to the vendor credit on the faith of his statement that this land was not incumbered, is a proposition abundantly established in this record.

It is only when the defendant vendee creditor answered the petition that this mortgage was set up as a valid, subsisting lien, and the defense was set up and made that in so far as the proceeds of the land sale were applied to discharge this mortgage debt it was the satisfaction of a valid lien, or incumbrance on the land, and that therefore the payment in full of this debt as against other creditors was not an unlawful preference, prohibited by the bankrupt law.

331 In such a situation as this the burden was on the defendant to establish the fact that this mortgage was originally executed and delivered in good faith, or subsequently delivered, and that it was at that time intended to take effect and to constitute a specific lien in good faith upon this land, and that such intention continued throughout the existence of the mortgage, and down to and at the date when the mortgage debt was satisfied out of the proceeds of the sale in question.

If, for example, that mortgage was withheld from record with the intention that the vendor creditor might obtain credit on the faith of the land, and in that way continue his mercantile business, and if the vendee creditor was aware of this, and assented to any such intention and purpose, the mortgage would be clearly invalid under the law, both state and federal, whatever the parties may have thought in regard to their right to carry out such a transaction as that.

The vendor and the vendee are in disagreement as to the facts attending the execution of this mortgage, its custody and the reasons and circumstances under which it was withheld from registration. The vendor says that the mortgage was executed by him voluntarily, without any demand or request by the vendee, whereas, the vendee testifies that it was executed at his request and upon his application.

The date of this mortgage is Sept. 24th, 1897, and, as stated, it was never registered down to the date of bankruptcy in 1903.

The vendor says that it was understood and agreed that it was not at the time to be registered, but that he told the vendee he would register it in the future if he so demanded, the exact answer being as follows:

"Q. Was there any agreement between you and your brother at that time as to whether or not you should put it of record, or keep it from record? If so state what the agreement was."

"A. I stated that I would not put it on record just at that time, but would do so whenever he wanted it done."

"Q. It was agreed that you should hold the trust deed and that it should not be put of record until such time as your brother might demand for his protection?"

"A. Yes, sir."

It is agreed that the vendee did not see this mortgage for two years subsequent to the date of its execution, and that during that time it remained locked up in the safe of the vendor, at his mercantile storehouse in the city.

332 The son of the vendor, and the nephew of the vendee creditor, was appointed Trustee in the mortgage.

It is in evidence that in two years after the date of its execution, and when the vendee brother was in this city, he asked to see the mortgage, and he says he then caused his nephew, the Trustee in the mortgage, to take the opinion of an attorney as to whether or not the mortgage could be withheld from registration, and that the Trustee was advised that it could be.

This statement of course, could only mean that he was informed by his nephew that the lawyer had so advised him, as the vendee creditor, the brother does not claim that he consulted any lawyer himself. He says that his nephew did not give him the name of such lawyer so consulted.

The reason assigned by the vendor for the non-registration of the mortgage was that it might injure the sale of the property, and that his partner did not desire that it should be recorded.

The trustee, his nephew, is not called as a witness in the cause, and no reason is assigned as to why he is not so called in support of the vendee creditor as to the custody of this mortgage and the reason for its non-registration.

There are other circumstances unusual in regard to this mortgage not necessary now to be detailed, but they are of minor importance.

Of course in dealing with such a question we look to the fact of the relationship between the vendor and the vendee, and the motive present for giving the vendee a preference over other creditors.

While withholding from record the mortgage would not furnish ground for setting it aside, it is still well settled that it is entitled to consideration and to considerable weight as evidence on the question of the *bona fides* of the transaction, and on the question of whether or not it was really intended to constitute a fixed charge upon the property, or whether it was merely executed with a view

that it might be withheld from the record and the vendor continue business and obtain credit upon the faith of the property and that the mortgage would be treated as effective and would be put upon record only in the event the debtor's embarrassment became so great that suspension of business should come about and a winding up and distribution become necessary, in which event the mortgage might be resorted to for the purpose of giving the favored creditor such advantage if any, as would be possible under those circumstances, should such a hopeless situation as that at any time arise in the future, for in that event the vendor would have come
333 upon a time and situation when registration would be made as being the thing which vendor's "brother might demand for his protection," to use the very language of the question.

Brown *v.* Easton, 112 F. R., 592.

On this evidence, inasmuch as the Trustee in the mortgage, who is a nephew of the vendee creditor, and presumably altogether favorable to him, has not been called to offer any explanation of the situation, or to support either the vendor or the vendee in their testimony, and looking to the other circumstances, including the conduct of the parties, and what has been done, as well as what has been omitted, I am satisfied that this mortgage if originally intended to have been effective and to continue constantly a fixed charge upon the property, had been in fact abandoned.

But on the contrary looking at these facts and circumstances in the light of reason and of our experience, my opinion is that the mortgage was executed and withheld from registration with a view not to make a lien upon the land, unless as already indicated, suspension of business and winding up should become necessary.

It was in all probability thought withholding it from record would enable the vendor to still continue his business, and that this apparently unencumbered tract of land would, of course, furnish large ground for the extension of such credit to him as would be necessary. It was probably what was thought to be a sort of method of "hoping for the best, but providing for the worst," as regards the interest of the favored brother.

As I have already indicated, whatever these parties may have thought of their right to carry into effect such a transaction as this, it was invalid under the law. It is not necessary to characterize the transaction, as the law does this. The purpose in such a transaction was one prohibited by the law of the state, which permits a mortgage to be withheld from registration and to remain good only in the event this is done in good faith, and with an intent and purpose perfectly fair to creditors, and it is also a transaction having the very character of an unlawful preference, which it is the main purpose of the bankruptcy act of 1898 to defeat.

What has been previously said must not be overlooked in this connection, namely, that the vendor after the execution of this mortgage, and during the six years of its custody without recordation, repeatedly and emphatically declared that the land was unen-

cumbered when attempting to obtain credit at the hands of
334 some of those now complaining of this transaction. These declarations and these statements by the vendor cannot possibly be reconciled with the proposition that it was intended to make the mortgage valid and effective from its date as a lien or encumbrance upon the land.

If the vendor had so intended to make this mortgage a valid and fixed charge upon the land, and believed at the time that the land was validly held, or encumbered by this mortgage, these representations to creditors would at once become most serious misrepresentations and misleading statements, and we must not presume that the vendor intended to deliberately misrepresent the situation, with a view to obtain money from those who were accepting his word in that behalf.

Substantially I think this case upon this point is within the principle announced in the case of Thompson National Bank *vs.* Corwine, 89 F. R. 774. (Opinion of Judge Taft.)

At all events I think it is a sound conclusion, on this record, to hold that the defendant had not sustained the burden cast upon him of showing by a fair and satisfactory preponderance of the evidence that the mortgage in question was executed, or intended to be executed and kept alive *bona fides* at all times as a specific charge upon this land, and such as might therefore be satisfied out of the proceeds of this large sale, to the disadvantage of the other creditors, without constituting a preference under the bankruptcy act.

This view renders it unnecessary to discuss other questions and issues made in this case, and I do not therefore, consider or determine other issues which have been much debated, for it will be open to either party in the court of review to say that the result of the case is right, or that the result of the case is wrong, for any good reason found in the record of the case.

It results, of course, from these views that I hold that the application made of the proceeds of the sale in question, except to the extent which I have already indicated as discharging the two small prior valid liens, cannot be sustained, and that the defendant has not, the burden being on him, sustained the validity and *bona fides* of the mortgage set up in his answer as constituting a valid lien, and for the purpose, to that extent, of avoiding the charge of preference under the bankrupt law.

Counsel can prepare a decree which will give full effect to these views, and giving the Trustee such decree against the defend-
335 ants Page and Markert, Executors of Thomas Merriam, deceased, as this ruling may require, credit being allowed, of course, for the two payments to Wright and the Chattanooga Savings Bank.

The costs of the case will go with the result of the suit.

CLARK, *Judge.*

(Here follows deposition of I. B. Merriam, filed August 30, 1904.)

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM ET AL.

On Reference.

Deposition of I. B. Merriam, Taken by Agreement in the Presence of D. L. Grayson, Commissioner; George Lancaster and Robert Pritchard, Attorneys for Plaintiff; Frank Spurlock, Attorney for Defendant.

Witness being called and sworn, on behalf of defendant, deposed as follows:

Examination by Mr. SPURLOCK:

Q. I hand you a list of the debts scheduled in your bankruptcy proceedings, and ask you to state on which of said debts you made payments within the four months before your petition was filed, and the amount paid on each debt?

A. I file herewith, marked Exhibit "A" a list of all payments made by me on the debts referred to.

Q. Please state which ones of the creditors named in this list of payments resided in Chattanooga, or had agents who represented them and lived in the city?

A. J. F. Loomis, First National Bank, Brooks Oil Company, Thomas Merriam, I. B. Merriam, Jr., Graham Brothers, Fritts & Wiehl, Glover & Grady, J. R. Baylor.

336 Q. Is N. H. Grady, whose deposition was taken in this cause, a member of the firm of Glover and Grady, to whom the $140.00 was paid?

A. Yes.

Q. I. B. Merriam, Jr., is a son of yours?

A. Yes.

Q. Was he a member of your firm?

A. No, sir.

Q. Was he connected with your firm in any way?

A. Yes, bookkeeper.

Q. Was Thomas Merriam a member of the firm?

A. No, sir.

Q. Was he connected with the business in any way?

A. He travelled for it.

Q. Who is the president of the First National Bank?

A. T. G. Montague.

Q. Is he the same Montague whose deposition was given in this cause?

A. He is.

Q. I will ask you to state what was the consideration of the note or debt scheduled in behalf of B. E. Tatum for $275.76?

A. A note given to Mr. Tatum for fee for presenting the claim of Mrs. S. O. Vann.

Q. What services were rendered in your behalf for that debt?

A. Mr. Tatum presented the notes that Mrs. Vann had against me for payment, and he extended the time on the notes.

Q. Was he employed by you as your attorney or representative?

A. He was employed by Mrs. Vann.

Q. Was there any other notes besides these, or any payments made to him, in the same consideration?

A. Yes, sir; I paid him about, I think, $1,000 besides this note.

Q. Was he the same B. E. Tatum who gave a deposition in this case in behalf of plaintiff?

A. Yes, sir.

Q. How long had he been representing Mrs. Vann as her attorney?

A. I think about four years.

Q. Will you examine your checks, notes and books, and file a statement showing the total amount paid to Mrs. Vann's attorney?

A. Yes, sir.

337 Q. Were you intimately and well acquainted with J. F. Loomis?

A. Yes, I had known him about 27 years.

Q. Is he doing business here?

A. Yes, lumber business.

Q. You had had business dealings and relations with him for a long time?

A. Yes, sir.

The trustee, by attorneys, comes and excepts to the foregoing deposition, and without desiring to appear as resisting any inquiry into the condition of the estate, or desiring to suppress any facts tending to show any unlawful preferences, shows that the creditors, whose claims are referred to in the foregoing deposition, are not, as the trustee is advised, represented by the trustee, so far as the question of establishing their claims is involved, but that in case of contest, the attitude of the trustee is antagonistic to creditors, and, moreover, that the claims of said creditors have already been proved and allowed against the estate, and, as the trustee is advised, this proceeding is ancillary to the bankrupt proceedings, and the creditors are not parties, so far as any dispute concerning their claims, on any question of their liability to refund payments received by them may be made, and if they are, these are matters concerning which they must represent themselves.

Wherefore the trustee excepts to the whole of the foregoing deposition, because it concerns matters wholly beyond the scope of the pleadings and issues in this case, and beyond the scope of the reference.

GEORGE D. LANCASTER,
ROBERT PRITCHARD,
Attorneys.

It is agreed, to save costs of taking depositions, that the commissioner may look to the record, proceedings and proof in the bankruptcy case of I. B. Merriam, for the purpose of ascertaining the debts, and that the lists of debts aforesaid, shall be treated as established by the evidence, when so made out from the record, proceedings and proof aforesaid, *shall be treated as established by the evidence*, for the purposes of this reference.

338 EXHIBIT "A."

J. F. Loomis, payment on note		$150 00
Blue Grass Canning Company, April 30, 1903		20 00
Mrs. S. O. Vann		402 04
Feb. 23	38 01	
Mar. 20	38 01	
Apr. 23	38 01	
May 25	38 01	
June 6	250 00	
The Williams Bros. Co.		73 02
First National Bank		14,683 98
March 16	$10 00	
March 26	20 00	
April 6	50 00	
April 12	10 00	
May 14	200 00	
June 2nd	3,298 47	
" "	4,000 00	
" "	3,500 00	
" "	2,509 00	
" 3rd	500 00	
" "	500 00	
" 8th	39 00	
" "	20 00	
" "	35 51	
American Syrup and Preserving Co.		285 28
Feb. 18th	$71 47	
Mch. 24th	41 85	
Apr. 3rd	42 00	
Apr. 5th	105 81	
Apr. 6th	77 84	
Apr. 12th	77 84	
May 18th	78 40	
May 27th	59 78	
Brooks Oil Company		100 00
National Enameling & Stamping Co. Mch. 28th		50 00
Thomas Merriam		345 57
Isaac B. Merriam, Jr.		172 26
Graham Brothers, Feb. 26th		25 00
Great Western Cereal Company, May 28th		59 00
Fritts & Wiehl, June 2nd		61 67
Greenville Tobacco Mfg. Co., March 25th		62 70
Glover & Grady, June 2nd		140 00
J. R. Baylor, June 2nd		10 00
Penn & Watson		50 00

339 (Here follows report of D. L. Grayson, Commissioner, filed August 30, 1904.)

District Court of the United States, Southern Division of the Eastern District of Tennessee.

In Bankruptcy. No. 517.

H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM.

Report of D. L. Grayson, Commissioner, to the Hon. C. D. Clark, Judge.

The undersigned Commissioner, to whom the above case was referred on the 2nd day of July, 1904, to ascertain and report.

First. What debts had been filed against the estate of said bankrupt which have been allowed or are allowable as valid claims against said estate.

Second. What amount it will be necessary for the executors aforesaid to pay into the court out of the proceeds of said sale to satisfy said claims.

The Commissioner took proof under this order of reference at the office of Brown & Spurlock in the city of Chattanooga on Thursday, the 25th day of August, 1904, in the presence of Robert Pritchard and George D. Lancaster, attorneys for H. F. Rogers, Trustee, and of Frank Spurlock, attorney for the defendants; and upon the proof taken and the stipulation of counsel to the effect that the Commissioner "may look to the record, proceedings and proof in the bankruptcy case of I. B. Merriam for the purpose of ascertaining the debts, and that the lists of debts when so made out from the record, proceedings and proof aforesaid shall be treated as established by the evidence for the purpose of this reference," would respectfully report as follows:

The Commissioner has examined the records in the bankruptcy case of I. B. Merriam in the office of the referee, and of the clerk of the United States District Court, from which it appears that up to the date of the filing of this report, the claims of creditors, duly proven in manner and form prescribed by law, against the said bankrupt, I. B. Merriam, amount to the total sum of $45,443.23, as will more fully appear by a detailed list thereof herewith filed and marked Exhibit "A" to this report.

340 As before stated, all of said claims are regular in form and duly proven as required by the bankrupt act and in accordance with the provisions of Section 57 D. of the bankruptcy act, have been provisionally allowed, subject, however, to the provisions of 57 K. authorizing a reconsideration for cause and their reallowance or rejection as the case may be.

Counsel for the defendants have taken the deposition of I. B. Merriam upon this reference, the purport of which is to show the

fact that a number of payments were made by him to certain creditors within the four months next preceding the filing of the petition in bankruptcy, and a list of such payments and of the respective amounts paid the particular creditors receiving the same is herewith filed marked Exhibit "B" to this report.

This deposition is taken by counsel for the defendants with the evident purpose and intent of establishing the fact that there are other creditors of the bankrupt other than the defendant sued in this cause who are in like situation as the defendant with respect to the right of the trustee to proceed against them for the recovery of preference paid them as was done in this case, and that it is the duty of the trustee to take appropriate action in that regard upon the necessary facts being made to appear; and that if such steps were taken by the trustee and such other preferred creditors made to disgorge their unlawful preference, the final decree against the defendant in this cause would be abated to that extent.

The trustee, by his counsel, however, objected to the deposition aforesaid upon the ground that the creditors whose claims are referred to as receiving preferences are not, as the trustee is advised, represented by the trustee so far as the question of establishing their claims is involved, but that in the case of contest the attitude of the trustee is antagonistic to creditors; and, moreover, that the claims of said creditors have already been proved and allowed against the estate, and that this proceeding is ancillary to the bankrupt proceeding and the creditors are not parties thereto, so far as any dispute concerning their claims or any question of their liability to refund the payments received by them may be made, and if they are, these are matters concerning which they must represent themselves.

The Commissioner is of the opinion that any objection to any claim duly filed and proven in the bankruptcy case can only be made in such proceeding by a direct issue raised by the Trustee against the particular creditor whose claim is sought to be inquired
341 into, upon a rule to show cause or other appropriate method that will give the creditor due notice and will bring him before the Court.

Because of this fact therefore, and the further fact that the record as now before me does not disclose whether or not there have been preferential payments within the four months as sought to be shown by defendants counsel, I cannot report upon such questions in this collateral proceeding.

The Commissioner therefore reports upon both the items of the order of reference that the total sum necessary to pay in Court out of the proceeds of said sale to satisfy the claims of creditors of said I. B. Merriam is the sum of $45,443.23, such sum being the face value of the amount of claims of creditors duly filed and proven in the bankruptcy case of I. B. Merriam at this date.

Respectfully submitted,

D. L. GRAYSON,
Commissioner.

"EXHIBIT A."

List of Unsecured Debts of I. B. Merriam, July 21, 1904.

Gus Cate	$2216 11
D. M. Coffman	500 00
J. F. Loomis	450 00
T. C. Ryall	43 10
Blue Grass Canning Co	116 16
Mrs. S. O. Vann	2697 52
Levy and Goldsmith	63 75
Mutual Rice Mill Limited	50 78
Jacob Dold & Co	18 00
Nordlinger Charlton Fireworks Co	34 30
O. W. Thrum Co	12 61
W. H. Dudley & Co	89 00
R. E. Whitaker	17 95
Ohio Match Co	126 44
C. F. Ware Coffee Co	116 25
The William Bros. Co	211 44
H. D. Huffaker	287 85
J. H. Allison & Co	20 57
M. Block & Co	70 79
D. C. Wheeler & Co	57 95
Indiana Match Co	110 48
C. F. Sauer Co	30 23
St. John Cigar Co	142 80
Willard Tobacco Works	52 00
342 First National Bank	2756 45
Tennessee Pure Food Co	24 30
American Chicle Co	102 00
American Syrup and Preserving Co	825 04
Brooks Oil Company	162 55
	$11,406 42
	$11,406 42
F. M. Reeves	1190 48
National Enameling & Stamping Co	67 02
Kingan & Co	30 00
B. Frank & Sons	139 97
T. H. Cheek	44 00
W. T. Hope	10 00
Thos. N. Merriam	987 42
Isaac Merriam	247 42
Thos. N. Merriam	293 85
F. A. Hood	20 77
Georgia Soap Co	30 15
A. D. Storey, Guardian	9000 00
A. D. Storey	250 00
F. F. Wiehl	2513 89

J. Weller Co.	254	72
Carthage Tobacco Co.	421	07
Brady Robinson Co.	28	10
N. Dietzen & Bro.	1236	57
N. R. Haymore	80	78
B. E. Tatum	275	76
Pritchard & Sizer	500	00
Lever Bros., Limited	150	00
National Biscuit Co.	62	06
Phil Lye Chemical Co.	36	25
A. J. Aull	27	69
Phillips Snuff Gum Co.	15	30
Graham Bros., Co.	21	34
J. L. Brown Banking Co.	5737	98
M. S. Block Son & Co.	26	20
Price & Lucas Cider & Vinegar Co.	24	20
R. M. Hughes & Co.	241	22
First National Bank	6250	00
Force Food Co.	40	50
Atlantic Peanut Co.	33	75
Jas. Pyle & Sons	35	58
Great Western Cereal Co.	84	00
Leopold Miller & Sons	83	56
Chatfield & Woods Co.	26	47
343 Hamilton Trust & Saving Bank	81	40
Scholze Bros. & Co.	449	70
Enterprise Soap Works	82	51
T. A. Snow Co.	37	90
Steinwender Stoffregen Coffee Co.	289	76
Wm. Demuth Co.	49	50
National Paper Co.	62	67
Crystal Oil Co.	21	25
Frank W. Winne & Son	53	49
Fritts & Wiehl	133	33
Davidson Clothing Co.	27	00
Sam Johnson	81	66
Glover & Grady	65	25
J. R. Baylor	32	65
National Starch Co.	68	75
G. Penn Sons Tobacco Co.	155	06
Penn & Watson	183	71
Ault Wooden Ware Co.	126	30
Chatta. Broom Works	10	80
Illinois Canning Co.	33	50
W. G. Deab & Son	78	54
Greenville Tobacco Mfg. Co.	121	59
	$44170	81
Kellogg & Shedden	117	75
Woolen Spice Co.	35	00
Maryland Biscuit Co.	81	17

Phœnix American Pipe Works		38 50
Gus Cate		1000 00
		$45443 23

EXHIBIT "B."

J. F. Lomis. Payment on note		$150 00
Blue Grass Canning Co., April 30, 1903		20 00
Mrs. S. O. Vann		402 04
Feb. 23rd	$38 01	
Mar. 20th	38 01	
Apr. 23rd	38 01	
May 25th	38 01	
Jun. 6th	250 00	
The Williams Bros. Co.		73 02
344		
First National Bank		14673 98
Mch. 16th	$10 00	
Mch. 26th	20 00	
Apl. 6th	50 00	
Apl. 12th	10 00	
May 14th	200 00	
Jun. 2nd	3298 47	
Jun. 2nd	4000 00	
Jun. 2nd	3500 00	
Jun. 2nd	2500 00	
Jun. 3rd	500 00	
Jun. 3rd	500 00	
Jun. 8th	30 00	
Jun. 8th	20 00	
Jun. 8th	35 51	
	$14673 98	
American Syrup & Preserving Co.		285 28
Feb. 18th	$71 47	
Mch. 24th	41 85	
Apr. 3rd	42 00	
Apr. 5th	105 81	
Apr. 6th	77 84	
Apr. 12th	77 84	
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Thomas Merriam		345 57
Isaac B. Merriam, Jr.		172 26
Graham Brothers, Feb. 26th		25 00
Great Western Cereal Co., May 28th		59 00
Fritts & Wiehl, June 2nd		61 67
Greeneville Tobacco Mfg. Co., Mch. 25th		62 70
Glover & Grady, June 2nd		10 00
Penn & Watson		50 00

345 (Here follows "Decree Confirming Report of Special Master, etc.)

Filed 22nd of September, 1904.

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM ET AL.

In Re I. B. MERRIAM, Bankrupt. No. 517.

This cause came on to be further heard on the report of the special master, D. L. Grayson, to whom it was heretofore referred, and his report being unexcepted to is in all things confirmed.

And it appearing from said report that the total amount of claims filed against the estate of I. B. Merriam, bankrupt, and which have been proven and allowed without exception heretofore made, is forty-five thousand, four hundred and forty-three and 23-100 dollars ($45,443.23), it is therefore ordered, adjudged and decreed that the plaintiff, H. F. Rogers, as trustee of the estate of I. B. Merriam, recover of E. J. Page and Robert Markert, executors of the estate of Thomas Merriam, deceased, the said sum of forty-five thousand, four hundred and forty-three and 23-100 dollars and the costs of this cause, for which execution may issue.

The net funds collected under this decree, after the payment of costs and such fees and expenses incident to this case as may be allowed by the court, shall be paid into the bankruptcy case, to be administered according to orders hereafter to be made therein.

Enter this,

CLARK, *Judge.*

O. K.
PRITCHARD & SIZER.
WILLIAMS & LANCASTER.
BROWN & SPURLOCK.

346 (Here follows "Prayer for Appeal," filed Oct. 4th, 1904.)

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

H. F. ROGERS, Trustee of I. B. Merriam, Bankrupt,
vs.
THOMAS MERRIAM ET AL.

E. J. Page and Robert Markert, executors of the above named defendant, now deceased, conceiving themselves aggrieved by the decree made and entered against them on the 22nd day of September,

1904, and also decree entered on the 2nd day of August, 1904, in the above-entitled cause, do hereby appeal from said orders and decrees of the United States Circuit Court of Appeals for the Sixth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers, upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

This 1st day of October, 1904.

BROWN & SPURLOCK,
Attorneys for Defendant.

The foregoing claim of appeal is allowed, this 1st day of October, 1904.

CLARK, *Judge.*

(Here follows "Assignment of Errors," filed Oct. 4, 1904.)

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

H. F. ROGERS, Trustee of Estate of I. B. Merriam, Bankrupt,
vs.
THOMAS MERRIAM ET AL.

And now, on the 1st day of October, 1904, come the said defendants, E. J. Page and Robert Markert, executors of Thomas
347 Merriam, now deceased, by Brown & Spurlock, their solicitors, and say that the decree in said cause is erroneous, and against the just rights of said defendants, for the following reasons:

First. Because the evidence fails to show that the said bankrupt, I. B. Merriam, either on November 15th, 1902, the time he entered into a written contract to convey his interest in the Cumberland county coal lands to Thomas Merriam, defendant's testator, or on the 1st day of June, 1903, when said lands were conveyed, was insolvent within the meaning of the bankruptcy law of 1898.

Second. Because the evidence fails to show that said I. B. Merriam, on either of said dates, knew that he was insolvent, or conveyed said lands to defendant's testator in contemplation of insolvency, or for the purpose or with the intent to give said testator a preference over said bankrupt's other creditors.

Third. Because the evidence fails to show that in June, 1903, when said I. B. Merriam settled with defendant's testator and allowed him to retain out of the purchase price of said lands the debts then due from said bankrupt to said testator, the vendee of the lands, or upon which he was endorser, the said bankrupt knew he was insolvent, if so he was, or contemplated taking the benefit of the bankrupt law, or intended to give defendant's testator a preference in violation of said law.

Fourth. Because the evidence shows that at the time I. B. Merriam conveyed the lands in question to Thomas Merriam, defend-

ant's testator, and agreed that the purchase price or proceeds of said sale should be applied to the payment of debts which the vendor in said sale owed to the vendee, and upon which the latter was endorser for the former, the said Thomas Merriam did not know that I. B. Merriam was insolvent or in contemplation of bankruptcy, or have reasonable cause to believe that the said I. B. Merriam intended by said sale, or the appropriation of the proceeds thereof, as aforesaid, to give him a preference over his other creditors, in violation of the provisions of the bankrupt law.

Fifth. Because the evidence shows that on November 15th, 1902, Thomas Merriam contracted in writing for the purchase of the lands in question, for the purpose, as understood and agreed to by I. B. Merriam of securing a settlement and payment of the indebtedness due from the said I. B. Merriam to him, or upon which he was endorser, wherefore he has the legal right so to appropriate the proceeds of said sale when it was finally, and before the proceedings in bankruptcy, consummated by a conveyance.

348 Sixth. Because the evidence shows that at the time of said sale and the appropriation of the proceeds thereof, thirty-five thousand ($35,000.00) dollars of the indebtedness due from I. B. Merriam to Thomas Merriam was secured by a mortgage or deed of trust on said lands, executed November 27th, 1897, and delivered to the mortgagee, and which, although not recorded, was good under the laws of Tennessee as between parties thereto; and at the time said mortgage debt was paid by the sale aforesaid, no creditor of I. B. Merriam, represented by complainant, had fixed a lien upon said land by attachment, execution or other legal proceeding. To the extent of said mortgage debt, the appropriation of the proceeds of said sale was therefore in satisfaction of a valid lien created more than four months before the filing of the petition in bankruptcy.

Seventh. Because the holdings of the court that said mortgage was not executed in good faith, and had been abandoned as a lien, is not supported by the evidence.

Wherefore, the said plaintiffs pray that the said decree be reversed, and that the said court may be directed to enter a decree dismissing the bill of complaint.

BROWN & SPURLOCK,
Solicitors for Plaintiffs.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit, ss:*

To H. F. Rogers, Trustee of the Estate of I. B. Merriam, Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, on the *20th day of November next, pursuant to a petition and order for appeal filed in the clerk's office of the District Court of the United States for the Eastern District of Tennessee, Southern Di-

vision, wherein E. J. Page and Robert Markert, executors of the estate of Thomas Merriam, deceased, were appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said petition for appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

349 Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 4th day of October, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States of America one hundred and twenty-ninth.

C. D. CLARK,
District Judge.

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*Not exceeding thirty days from day of signing.

We acknowledge due and legal service of this citation, this Oct. 4, 1904.

PRITCHARD & SIZER,
WILLIAMS & LANCASTER,
Solicitors for Appellee.

No. 517. District Court of the United States, Eastern District of Tennessee. In Bankruptcy. In the matter of I. B. Merriam, Bankrupt. Citation on Appeal. Filed October 4, 1904. Henry O. Ewing, Clerk.

(Here follows "Bond on Writ of Error or Appeal," filed Nov. 2nd, 1904.)

Know all men by these presents. That we, E. J. Page and Robt. Markert, Executors of Thomas Merriam deceased as principals and Frank Spurlock as surety are held and firmly bound unto H. F. Rogers, Trustee of the estate of I. B. Merriam, Bankrupt in the full and just sum of five hundred dollars to be paid to the said H. F. Rogers, Trustee certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 2nd, day of November, in the year of our Lord one thousand nine hundred and four.

Whereas lately at a District Court of the United States for the Eastern District of Tennessee in a suit depending in said Court, between E. J. Page and Robert Markert, Executors etc., and H. F. Rogers, Trustee etc., a decree was rendered against said E. J. Page and Robert Markert, executors etc., and the said E. J. Page and Robert Markert, Executors having obtained an allowance of an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said H. F. Rogers, Trustee citing and admonishing

350 him to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the

City of Cincinnati, in said circuit on the 2nd, day of November, 1904.

Now the condition of the above obligation is such, that if the said E. J. Page and Robert Markert, Executors shall prosecute appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation is void; else to remain in full force and virtue.

E. J. PAGE & [SEAL.]
ROBERT MARKERT, [SEAL.]
Executors of Thomas Merriam, Deceased.
FRANK SPURLOCK, *Surety.*

Sealed and delivered in presence of,
HENRY O. EWING.

Approved by,
C. D. CLARK, *Judge.*

(Here follows "Order Extending Time to File Transcript." Filed Nov. 2, 1904.)

In re I. B. MERRIAM, Bankrupt.

Bankruptcy. No. 517.

H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM ET AL.

In this cause for satisfactory reasons appearing the time for filing the transcript in the Circuit Court of Appeals is extended thirty days.

Enter this, C. D. CLARK, *Judge.*

(Order Directing Original Note and Deed of Trust Sent up with Transcript. Filed 1st day of Dec., 1904.)

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM ET AL.

351 On application of counsel for the Complainant and for satisfactory reasons appearing to the Court, it is ordered by the Court that the original deed of trust made by I. B. Merriam to —— Merriam, Trustee for Thomas Meriam, dated — day of ——, be sent up with the record in this case; and on application of counsel for Thomas Merriam, and for satisfactory reasons appearing to the

Court, it is ordered that the original note for $35,000 from I. B. Merriam to Thomas Merriam, dated — day of ——, be also sent up with the record; said two papers are to be transcribed into the record, and the originals shall also be sent up for the inspection of the Court of Appeals.

Enter this,

C. D. CLARK, *Judge.*

(Here follows "Prayer for Appeal of H. F. Rogers, Trustee. Filed Dec. 1st, 1904.)

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM ET AL.

In re I. B. MERRIAM, Bankrupt.

The above named plaintiff conceiving himself aggrieved by the decree made and entered on the 22nd, day of Sept., 1904, in the above entitled cause, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Sixth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the aforesaid Circuit Court of Appeals.

PRITCHARD & SIZER,
WILLIAMS & LANCASTER,
Attorneys for Complainant.

Dated Nov. 30th, 1904.

The foregoing claim of appeal is allowed, without bond for costs.

C. D. CLARK,
U. S. Judge.

352 (Here follows "Assignment of Error of H. F. Rogers, Trustee. Filed Dec. 1st, 1904.)

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

No. 517.

H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM ET AL.

In re I. B. MERRIAM, Bankrupt.

Assignment of Error.

And now on the 30th, day of Nov., 1904, comes the said complainant, by his solicitors and says that the decree in the above

entitled cause, entered on the 22nd, day of Sept., 1904, is erroneous and against the just rights of said complainant for the following reasons:

Because the evidence showed that Thomas Merriam had wrongfully and unlawfully, in contravention of the provisions of the Bankruptcy Act, appropriated to himself and for his benefit the sum of $60,000, and therefore, the Court erred in not entering a decree against the personal representatives of Thomas Merriam, deceased for the full amount of the unlawful preference obtained by him, as aforesaid, to be disposed of and administered under the order of the Court in the bankruptcy proceeding in the matter of I. B. Merriam, bankrupt.

Wherefore the said complainant prays that the said decree be corrected and that the said District Court may be directed to enter a decree requiring the said Thomas Merriam to pay into the registry of this Court the whole of the unlawful preference aforesaid.

PRITCHARD & SIZER,
WILLIAMS & LANCASTER,
Solicitors for Complainant.

353 (Here follows order extending time for filing transcript. Filed Dec. 2nd, 1904.)

In re I. B. MERRIAM, Bankrupt.

No. 517. Bankruptcy.

H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM ET AL.

In this cause for satisfactory reasons appearing, and by consent of parties the time for filing the transcript in the Circuit Court of Appeals is extended thirty days.

UNITED STATES OF AMERICA,
Eastern District of Tennessee, Southern Division, ss:

I, Henry O. Ewing, Clerk of the District Court of the United States within and for the District aforesaid do hereby certify that the foregoing two volumes comprise a full, true and perfect transcript of the record under the petition of H. F. Rog[illegible] Trustee, *vs.* Thomas Merriam *et al., In Re,* I. B. Merriam, Ba[illegible]pt, No. 517 as designated by counsel for appellants and counsel fo[illegible] appellees.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at the city of Chattanooga, Tenn., this day of Dec. A. D. 1904.

HENRY O. EWING, *Clerk,*
[SEAL.] By JNO. D. KEY, *Deputy Clerk.*

354 And afterwards, to-wit: on the 24th day of December A. D. 1904 an appearance was filed in said cause clothed in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1389.

THOMAS MERRIAM
vs.
H. F. ROGERS, Trustee of the Estate of I. B. Merriam.

Frank O. Loveland, Clerk of said Court:
Please enter my appearance as Counsel for the Appellant.
FRANK SPURLOCK.
FOSTER V. BROWN.

And afterwards, to-wit: on the 13th day of June, A. D. 1905 an entry was made upon the journal of said court clothed in the words and figures following, to-wit:

Journal C, Page 185.

No. 1389.

H. F. ROGERS, Trustee of I. B. Merriam, Bankrupt,
vs.
E. J. PAGE ET AL., Executors of Thomas Merriam, Dec.

Before Lurton, Severens, and Richards, JJ.

This cause is argued for appellant by Mr. Robert Pritch-
355 ard and for appellees by Mr. Frank Spurlock and submitted.

And afterwards, to-wit: on the 3rd day of October A. D. 1905 a decree was rendered in said cause clothed in the words and figures following, to-wit:

No. 1389.

H. F. ROGERS, Trustee of the Estate of I. B. Merriam, Bankrupt,
vs.
E. J. PAGE and ROBERT MARKERT, Executors of the Estate of Thomas Merriam, Deceased.

Appeal from the District Court of the United States for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, It is now here ordered adjudged and decreed by this Court, that the decree of the said District Court, in this cause be and the same is hereby so modified as to direct the ascertainment of the money necessary for the purposes indicated whereupon to enter a decree against the executors of Thos. Merriam

for the sum thus settled, not however to exceed the amount applied by Thos. Merriam in payment of his own claims and that which, by his insistence, was applied in his exoneration as surety or endorser. The costs of this appeal will be paid by the executors
356 of Thos. Merriam.

And afterwards, to-wit: on the 6th day of November, A. D. 1905 an opinion was filed in said cause clothed in the words and figures following, to-wit:

Opinion.

357 Filed Nov. 6, 1905. Frank O. Loveland, Clerk.

No. 1389.

United States Circuit Court of Appeals, Sixth Circuit.

H. F. ROGERS, Trustee, Appellant,
vs.
E. J. PAGE and ROBERT MARKERT, Executors, etc., Appellees.

In Bankruptcy.

Appeal from the District Court of the United States for the Eastern District of Tennessee.

Submitted June 13, 1905; Decided October 3, 1905.

Before Lurton, Severens, and Richards, Circuit Judges.

This is a bill by the Trustee in Bankruptcy of I. B. Merriam to recover the purchase price of a tract of coal land alleged to have been sold and conveyed by the bankrupt to his brother, Thos. Merriam, within four months of bankruptcy for the purpose of preferring said Thos. Merriam by the application of the price to the payment of an alleged indebtedness to the purchaser, contrary to the provisions of the bankrupt act.

There was a decree holding the application of the purchase price to have been a preference and requiring the executor of Thos. Merriam to pay to the complainant a sum sufficient to pay the bankrupt's unsecured debts.

The complainant appealed because the court did not require the full amount of the purchase money to be paid to him and the
358 executor of Thos. Merriam has appealed from the entire decree.

LURTON, *Circuit Judge*, delivered the opinion of the Court:

The facts as we find them to be upon the weight of the evidence, necessary to be preliminarily stated, are these:

1. On Jan. 1, 1903, I. B. Merriam, the bankrupt, and C. H. Jarnagin, being joint owners of a tract of coal land situated in

Cumberland county, Tennessee, joined in a sale and conveyance of same to Thos. Merriam, a brother of the bankrupt. For the undivided interest of I. B. Merriam, Thos. Merriam agreed to pay $65,000.00 in money and $20,000.00 in the stock of the Tennessee Lumber & Coal Company, a corporation to which Thos. Merriam immediately sold and conveyed the land.

This purchase price was appropriated by agreement between the parties as follows:

a. In clearing the title by acquiring a small interest in a part of the land owned or claimed by one Wright, $5,400.00.

b. By discharging a lien upon the bankrupt's interest in favor of the Chattanooga Savings Bank, $2,000.00.

One of the conditions of the sale was that the above prior liens should be paid off so that the remainder of the purchase price is alone involved in the question of an unlawful preference.

The shares of stock thus received were immediately pledged to Thos. Merriam to secure him as endorser of a note for $10,000 that day made and discounted by I. B. Merriam in a bank at Rochester.

The remainder of the cash proceeds of sale, after providing for the two superior liens mentioned above, and the proceeds of the new note endorsed by Thos. Merriam, were applied and appropriated as follows:

First, to the payment of an alleged indebtedness of I. B. Merriam, to Thos. Merriam. Second, to Thos. Merriam's exoneration as security or endorser upon obligations of I. B. Merriam to a bank at Rochester, New York, the residence of Thos. Merriam. Third, to
the exoneration of Thos. Merriam as security or endorser for
359 I. B. Merriam & Son, upon paper outstanding at Chattanooga, the place of residence of the bankrupt.

The funds with which these latter payments were made were placed in the hands of I. B. Merriam, Bankrupt, with the distinct agreement that Thos. Merriam should be protected by the payment of the claims upon which he was liable.

It is possible that out of the gross sum of $75,000.00 in money arising from the sale of the land, including the $10,000 raised by pledge of the shares of stock received as part of the price, that a few thousand dollars, not exceeding $10,000, was used by the bankrupt for purposes other than the protection of his brother, for the evidence is not clear or detailed as to the sums retained in the first instance by Thos. Mer-iam on account of the indebtedness of I. B. Merriam to him or for the purpose of paying off claims at Rochester upon which he was liable in some form of suretyship.

Neither is the evidence satisfactory as to the precise amount of the claims paid off at Chattanooga by I. B. Merriam out of the proceeds of sale under his agreement to protect his brother by such application of that part of the price brought to Chattanooga from Rochester.

At the time of this transfer and appropriation I. B. Merriam was hopelessly insolvent *and within ten days he filed his voluntary petition to be adjudicated a bankrupt and was so adjudged.*

His assets consisted of a number of parcels of real estate situated in Chattanooga, all mortgaged for their full value or more and a

remnant of a stock of merchandise belonging to the firm of I. B. Merriam & Son, appraised at $1,800.00. The debts of I. B. Merriam individually and of I. B. Merriam & Son excluding debts due to Thos. Merriam, or secured by him, and wholly unsecured, aggregate approximately $50,000.00 with no assets to apply to their payment if the purchase price of this coal land be excluded.

It is therefore evident that when I. B. Merriam agreed to apply the proceeds of the sale of this land in exoneration of Thos. Merriam as his surety and in payment of the alleged indebtedness to
360 him that he was hopelessly insolvent and could not but know that such was the case.

Neither was this a recent condition for the evidence satisfactorily shows that for several years he had been in failing circumstances and that his creditors were held off only by the apparently unincumbered condition of his coal lands and the constant promise that he was about to dispose of them for a price which would pay all of his debts and disencumber his Chattanooga property.

2. Neither do we see any reason for disagreeing with the court below in respect of its conclusion that Thos. Merriam was aware of his brother's condition at the time he bought the land here involved, or of such suspicious facts as to charge him with inquiry and notice of such facts as he might have learned by an inquiry conducted in good faith. The bankrupt was his brother. For several years he had been supporting his credit both by endorsements and by lending him money.

He claims that as far back as 1897 he had taken his brother's note for $35,000.00 secured by an unrecorded mortgage upon his undivided interest in this coal land. This note he claims was for moneys theretofore loaned his brother from time to time which at the time the note and mortgage was given approximated $25,000.00 and for additional sums which he might thereafter lend him.

This debt grew by reason of further alleged loans and through accumulation of interest until it approximated $44,000.00 at the date of payment Jan. 1, 1903. In addition to this he claims to have incurred liability for him to the extent of probably $15,000.00 more. That his brother's affairs were not prosperous and that his debts were increasing he was bound to know from the nature of his own transactions with him. It is true he did not live at Chattanooga, but he occasionally visited his brother and concedes some degree of knowledge touching other indebtedness of the bankrupt. His deposition in support of his defense has been carefully read. It is neither full nor frank and impresses us with the conviction that he was aware of the precarious condition of his brother's affairs as far back as Sept.,
1897, when he claims to have demanded a mortgage upon this
361 coal land.

That he should agree not to record the instrument then taken until he should deem it necessary for his own protection is significant of his knowledge of his brother's condition and of the effect upon his credit if recorded.

The very fact that after carrying his brother for years he should

demand the immediate payment of his entire debt out of the proceeds of the sale of this land and his exoneration from liability as surety by payment of every debt upon which he was bound, admits of but one explanation in the light of this evidence, and that is that he knew his brother was insolvent and that if he was not thus preferred he would lose a large part of his debt.

The mere fact that the mortgage of 1897 was not recorded does not, under the law of Tennessee, affect its validity except as to creditors and purchasers without notice, if it was made for a valuable consideration and in good faith.

As between the parties to the instrument it was, if made and held in good faith, a perfectly valid security. *Shannon's Tennessee Code, Sec.* 3572; *Sharon v. Grady,* 6. Yerg., 320; *Hays v. McGuire,* 8 Yerg. 92; *Green v. Goodall,* 1 Cold. 404; *Woods v. Bonner,* 89 Tenn. 411.

Being a valid security under the law of the state it was entirely competent for the mortgagee to demand and receive payment, or to enforce his lien in default, and if foreclosure occur or payment is received by the voluntary action of the mortgagor before the property is seized by creditors or impounded as a consequence of an adjudication in bankruptcy the transaction will not be a preference, provided the unrecorded lien was created more than four months before adjudication.

The preference over other creditors in such case was given when the mortgage was executed and delivered. *Sabin v. Camp,* 98 F. R. 974; *Humphrey v. Tatman,* 198 U. S., 91.

It follows that if the defendant has shown an appropriation of a part of the purchase price of the bankrupt's coal land in satisfaction of a valid indebtedness secured by an unrecorded lien made, accepted and held in good faith, more than four months before the
362 filing of the mortgagor's voluntary petition in bankruptcy, he may escape a decree against him to that extent.

3. The real controversy is as to whether the unrecorded security set up by the defendant was a valid, good faith instrument.

But before considering this question of fact it is necessary to determine whether the good faith of this unrecorded mortgage is open to question under the pleadings.

The defendants very strenuously insist that its validity is not attacked by any pleading and hence it is not subject to investigation.

The original bill charges that the conveyance by the bankrupt of his interest in this tract of land only eight days before filing his petition to be declared a bankrupt was a conveyance "made and contrived of malice, fraud, covin, and collusion to the intent and purpose, to hinder, delay and defraud creditors of said bankrupt of their lawful and just actions, suits, debts and acts and therefore wholly null and void" and that said Thomas Merriam was aware of the fraudulent purpose of his brother and accepted the deed in order to aid him in defrauding his creditors.

Upon this theory, the land having been at once sold and con-

veyed by Thos. Merriam to a coal mining corporation, the bill seeks to recover the value of the interest of the bankrupt.

But the bill also proceeds upon the theory that the defendant claims to have appropriated the agreed price of the land "in liquidation of claims or demands" that said defendant had against the bankrupt.

If this be true, says the complainant in his bill, then such an appropriation was an unlawful preference, the grantor being insolvent and intending a preference, his intent being known to the purchasing creditor.

The prayer of the bill is first, that the sale and transfer be decreed null and void as made in fraud of creditors, or second, if mistaken in this, that the appropriation of the price to the satisfaction of debts due to the defendant be declared an unlawful preference, etc.

363 After denying all averments of fraud in fact and of knowledge of the insolvency of the bankrupt or intent to procure a preference forbidden by the bankrupt law the answer proceeds as follows:

"Defendant further alleges affirmatively by way of defence to said petition that the facts concerning the transaction between this defendant and said bankrupt are as follows:

"That this defendant has loaned from time to time since during or about the year 1892, to said I. B. Merriam various sums of money and has endorsed various notes for said I. B. Merriam.

"That during the summer of 1897, the said I. B. Merriam executed and delivered to the trustee therein named for the benefit and security of this defendant a trust deed conveying all his interests in the lands mentioned in said petition herein for the sum of twenty-five thousand dollars which trust deed was executed, delivered and accepted as and for a complete and continuing security to this defendant for any and all sums of money which he might loan to said I. B. Merriam and as and for a continuing security to this defendant for any liability which he might incur by reason of endorsing notes or other commercial paper for said I. B. Merriam.

"That thereafter and on or about the 11th day of April, 1889, said bankrupt executed and delivered to this defendant for the security of defendant another trust deed conveying the same property which was and was intended to be continuing security for the benefit of this defendant for any endorsement which he might make for said I. B. Merriam and for any and all sums of money which he might loan him to the amount of $35,000.00 and interest.

"And said deed was thereafter delivered by this defendant to the trustee therein named, in said month of April, 1899.

"That this defendant loaned to and endorsed for said I. B. Merriam from time to time to the amount of $55,000.00.

"That said I. B. Merriam had endeavored repeatedly to sell said coal lands, but without success. That during or about the month of December, 1902, defendant entered into an agreement with said I. B. Merriam, by the terms of which this defendant was to enter into possession of said premises and negotiate a sale of the same if

possible, and out of the proceeds of said sale first pay himself
364 the amount due for money loaned and take up such paper as he was liable on as endorser and for all of which he was secured by the trust deed aforesaid.

"That in pursuance of said arrangement this defendant made a sale of said premises, took title thereto from said I. B. Merriam and out of the purchase price of $65,000.00 paid the debt to him, this defendant, and notes on which he was accommodation endorser in bank of Syracuse to the amount in all of $42,000.00 or thereabouts, and paid over to said I. B. Merriam in cash the sum of $25,032.00 or thereabouts.

"That after such transaction was completed, defendant was informed by his said brother, I. B. Merriam, that he was not going to have sufficient money to pay all of his debts and the defendant enquired of his said brother as to the amount he would require in addition and was told that he would require ten thousand dollars, and with said sum he could pay all his creditors and would be in comfortable circumstances and could keep his Chattanooga real estate. That thereupon this defendant loaned to said I. B. Merriam the sum of ten thousand dollars in addition to the $25,032.00, which he has turned over to him out of the proceeds of said property."

The answer concludes as follows:

"That the lands to which this defendant so took title were lands upon which this defendant had perfect security and a valid lien under and by virtue of the trust deeds hereinbefore referred to and as to which lands no other creditors had or could acquire any lien or title whatever.

"Wherefore defendant prays that the petition and bill of petitioner and complainant herein be dismissed with costs and that it be adjudged that this defendant obtained no unlawful preference as against the creditors of said I. B. Merriam and that defendant obtained from said I. B. Merriam a perfect title to the lands described in the petition herein."

The issues thus made are, first, the general fraudulent character of the conveyance of June 1, 1903; second, if not fraudulent, that the appropriation of the agreed purchase price in payment of the claims of the grantee and in his exoneration as a surety was an unlawful preference under the bankrupt law.

As a defense to this charge of an unlawful preference
365 the defendant sets up an unrecorded secret lien given more than four months before bankruptcy and in effect says:

"This was a valid *bona fide* lien, good between the parties although unrecorded, and made more than four months before bankruptcy and the application of the purchase money in discharge of such a lien was not a preference."

The defense is a good one, but the burden of establishing the existence of such a valid pre-existing lien is upon the defendant who thereby seeks to escape liability as for a preference.

This was the view of Judge Clark and in his conclusion we concur.

Conceding that the evidence shows that I. B. Merriam was in-

debted to his brother in September, 1897, to the extent of approximately $25,000.00, as now claimed, and that his debt was from time to time increased until it approximated $44,000.00 in June, 1903, there remains the question as to whether there existed at the latter date any valid *bona fide* lien for the security thereof made more than four months before that time. That there ever was an unrecorded mortgage upon this land in favor of Thos. Merriam appeared for the first time in his original answer, an answer prepared and filed in his life time and the pleading upon which all the evidence was taken upon which this case was heard.

That answer set up and claimed a right to appropriate the purchase price of this land under two distinct mortgages, both made several years before bankruptcy and neither corresponding in essential particulars to the single mortgage produced and relied upon at the hearing.

One, he says, was made in the summer of 1897 to secure $25,000.00, as a "continuing security to this defendant for any and all sums of money which he might loan to I. B. Merriam and as and for a continuing security to this defendant for any liability which he might incur by reason of endorsing notes or other commercial paper for said I. B. Merriam." Another he says was made on or about April 11, 1899, conveying same property "which was
366 intended to be a continuing security for the benefit of this defendant for any endorsement which he might make for said I. B. Merriam, and for any and all sums of money which he might lend him to the amount of $35,000.00 and interest. And said deed was thereafter delivered by this defendant to the trustee therein named, in said month of April, 1897."

The instrument under which the defendant claims a lien more than four months antecedent to the bankruptcy of I. B. Merriam is a mortgage purporting to have been executed September 24, 1897, to Thos. M. Merriam, as trustee, to secure a note made by I. B. Merriam, as trustee, to secure a note made by I. B. Merriam of even date to Thos. Merriam for $35,000.00, payable one year after date without interest.

A note of same date and for $35,000.00, signed by I. B. Merriam and payable to Thos. Merriam, has also been produced in evidence.

This mortgage does not correspond in date with either of the mortgages or trust deeds set up in the answer. The depositions of both Thos. and I. B. Merriam were taken at large and each undertook to show the amount of indebtedness of the bankrupt to Thos. Merriam. They both testify to the execution of the instrument in evidence, but neither pretends that any other mortgage was ever made and neither in any way undertakes to explain the averments of Thos. Merriam's answer in respect to the lien relied upon to defeat the claim for recovery of the price of this land as a preferential appropriation.

That the instrument produced was originally written to secure a note for $25,000.00 and that it has been altered so as to make it secure a note for $35,000.00 is apparent from a careful examina-

tion of the original instrument, which constitutes a part of the record in this case.

Whether in the absence of suspicious circumstances a presumption would not exist that an alteration discoverable by inspection was not made at the time of execution we need not decide. The question at last is one of fact for this court to determine upon all the facts and circumstances, this being an appeal in equity.

There are two circumstances which tend to rebut any presumption of an alteration contemporaneous with the execution of the
367 paper. The first is, that the ink used in making the alteration is of a darker color than that of the body of the instrument. This suggests the use of a different ink or an alteration materially later than the writing in the body of the paper.

It may be that the alteration was made before delivery but after the original paper had been drawn. It may be that it was made after delivery by consent of the parties and for the purpose of enlarging the security because the debt had been enlarged. There should have been an explanation. There is none, save that counsel say these alterations were not drawn to their attention until argument of the case below. But even then no effort was made to explain and the court is left to conjecture when and why so material an alteration should have been made. The other circumstances of suspicion in view of this alteration is the fact that the original answer set up two distinct mortgages, one to secure a $25,000.00, and another to secure a $35,000.00 note. There is now no pretense of an independent mortgage to secure $25,000.00, but reliance is placed upon a mortgage originally drawn to secure a debt of $25,000.00 which has been altered to secure a $35,000.00 debt, and yet does not correspond in date with that described in the answer. An alteration by consent of both parties of an instrument to secure $25,000.00 to one securing a debt of $35,000.00 may have left an impression in the mind of Thos. Merriam in the absence of the instrument that he had had two independent mortgages one for $25,000.00, and the other for $35,000.00, and that he instructed his counsel as to the facts to be stated in his answer while laboring under this impression. Whatever the truth of the matter there is no adequate explanation of this surprising variance between the answer and the evidence or of the alteration of the mortgage produced in so material a matter as the amount of the lien created. The case went to a hearing upon the allegations of the answer setting up two distinct mortgages, neither of which corresponded with the single mortgage in evidence. After the hearing the defendant died.

Whereupon, while the case was under advisement, his execu-
368 tors, the present appellants, came in and asked to have the cause revived against them. They at the same time obtained leave to amend the answer of the deceased testator in respect to the lien justifying his appropriation of the purchase price of the bankrupt's coal land by making it to read: "That the deed of trust executed by I. B. Merriam, to secure the note of $35,000.00, which was dated September 24, 1897, was of even date with said note and also dated September 24, 1897, *and was the only deed of trust exe-*

cuted by I. B. Merriam to secure the indebtedness due from him to Thos. Merriam in June, 1903." The italics are ours.

This amendment was allowed upon the affidavit of Mr. E. J. Page, the lawyer who drew Mr. Thos. Merriam's answer and took his deposition. That affidavit amounts to nothing more than an expression of Mr. Page's opinion that as the answer was unsworn and Mr. Merriam in delicate health he must or probably misunderstood his client's instructions in regard to the facts and that in the taking of the evidence he had not discovered the discrepancy between the answer and the evidence in this matter. As tending to throw further suspicion upon the *bona fides* of the mortgage under which Thos. Merriam's appropriation of so large a part of the purchase price of this land is sought to be justified, the evidence strongly tends to show that the mortgage, whether for the one sum or the other was never intended to constitute an immediate security for the debt existing at its date or to be created thereafter. It was never recorded and remained a secret lien until disclosed during the bankruptcy proceedings.

The transaction was between brothers. The son of the bankrupt was the trustee. Not only was its existence kept secret, but existing and subsequent creditors were lulled into inactivity by repeated assurances from the mortgagor that this coal land was unincumbered and that he was about to make a sale of it and that the proceeds would pay all of his debts and leave his other property unincumbered.

Indeed just prior to the actual sale to his brother and
369 while that was being negotiated he assured several of his local creditors that he was about to sell and upon his return from the East would be able to settle with all of them. He went East, concluded the sale to his brother and returned with only the money necessary to pay off obligations upon which Thos. Merriam was bound, having received it from his brother under pledge to use it in that *may* only. This done he at once applied to be declared a bankrupt.

At the date of this mortgage September 24, 1897, the mortgagor was, as we have before stated, actually insolvent.

All of his realty other than this coal land was mortgaged for its full value or more. He had a heavy unsecured debt to his brother and others, the debt to his brother then approximating $25,000.00. He was in business as a grocer. But that business was then dwindling for want of capital to carry it on. He entertained the hope that Chattanooga real estate would recover the values which prevailed when he acquired his Chattanooga real estate and that if he could hold on he might or would save himself. This much his brother knew. His own loans were confessedly to enable him to tide over a period of depression by enabling him to continue business and hold on to his speculative but mortgaged investments.

In this situation Thos. Merriam demanded a mortgage upon the only unincumbered property, of any important value owned by his brother, a mortgage not to secure a loan presently made, but a debt which had been growing for years, and to secure such other advances

as he might thereafter make. And so a note for $35,000.00 was taken, and a mortgage to secure same, though only $25,000.00 was then owing. This unmortgaged coal land was then and for years afterward the chief prop upon which I. B. Merriam's credit leaned and by which he was able to hold his creditors off. In this condition of things the disclosure of a debt of $35,000.00 to Thos. Merriam and a mortgage to secure it would in all human probability precipitate matters and bring down upon him every creditor he had.

370 The mortgage purports to have been drawn and acknowledged September 24, 1897, but was not delivered until some time in 1899. Some time in the year last mentioned Thos. Merriam visited Chattanooga. The mortgage was then, as we understand the evidence, placed in the hands of Thos. M. Merriam, a son of the bankrupt, his partner in business and the trustee named therein. This delivery, if such it was, was under an agreement that the instrument should not be recorded until such time as it should become necessary for the protection of the Merriams.

This agreement Thos. Merriam says was made after he had had the trustee obtain the opinion of counsel as to its effect upon the validity of an unrecorded lien.

Now was it intended that this mortgage should at once become an existing specific lien upon the lands described therein from and after September 24, 1897, for the sole and single purpose of securing the debt then due and advances thereafter to be made, an intention to make such further loans being in no way disclosed, or was it intended as a prospective security to become effective as such by registration at such time as the interests of the beneficiary should require.

That it was not intended to become effective when made and dated is plain from the fact that it was not delivered for perhaps two years, and when it was placed in the hands of the trustee, the bankrupt's son and partner, it was subject to the agreement against registration.

If the meaning of what then occurred was that the instrument was to be held by way of escrow, becoming effective as a specific lien only in the event the affairs of I. B. Merriam should get into such a situation as to require the protection of his brother by putting this agreement for a mortgage into effect as a specific loan, there would be no reason for claiming that it ever came into effect prior to June 1, 1903, and then only as a consequence of an agreement of the parties then made. That it was the purpose of the parties that it should only go into effect as a lien when registered is most consistent with the conduct of the parties and this was the conclusion of the

371 court below and in this we are disposed to concur.

Taking all the facts and circumstances of the case together we are not convinced that the court below erred in holding this mortgage invalid for want of good faith irrespective of whether it was intended to go into effect when delivered in 1899 under the agreement against registration. That agreement, we are convinced

was made for the purpose of enabling I. B. Merriam to hold himself out as the owner of this coal land. This he did. He was thereby enabled to continue in business for several years, his debt constantly increasing.

The fact that this was a secret lien gave this property the appearance of being unincumbered and was the moving inducement of some of his existing creditors to grant delay by extension and renewal. The debtor actively represented this land as an available asset which he was in constant expectation of selling and that the proceeds would pay all his debts and disencumber his other property. These representations operated to quiet his existing creditors and to obtain from some of them extensions and renewals and new credit in at least one proven case. Neither is the unexplained alteration of the mortgage, aside from its technical effect as an alteration, consistent with a *bona fide* purpose to secure a lien for an honest debt.

These facts and others, not so important but yet of some weight which appear in the transcript, convince us that the lien claimed was not a *bona fide* lien of more than four months' existence at date of bankruptcy. That good faith as well as a valuable consideration is necessary to sustain a mortgage or conveyance against creditors has been considered as essential ever since *Twynes Case*, 3 Coke, 80; *Davis v. Schwartz*, 165 U. S. 631, 638-9; *Story Eq.* 353.

The mere fact that a mortgage has by negligence been omitted from registration does not avoid it as between parties. *Cowan v. Gill*, 11 Lea (Tenn.) 674; *Blennerhassett v. Sherman*, 105 U. S. 100, 111; *In re Shirley*, 112 F. R. 301; *Insurance Co. v. Shoemaker*, 11 Pick. 78, 83. But there is a distinction between a mere
372 negligent failure to record a mortgage or deed and a deliberate agreement to do so, although the mere fact of an agreement to withhold from record is not of itself such evidence of a fraudulent purpose as to constitute fraud in law. It is, however, a circumstance constituting more or less cogent evidence of a want of good faith, according to the particular situation of the parties and the intent as indicated by all of the facts and circumstances of the particular case. 14 *Ency. A. & Eng. Law*, p. 526; *Story Eq. Sec.* 363; *Bigelow on Fraud*, p. 88 *et seq.; Brown v. Easton*, 112 F. R. 592; *Corwin v. Thompson N. Bank*, 105 F. R. 196; *Cadogan v. Kennett*, 2 Cowp. 432; *Davis v. Schwartz*, 155 U. S. 631, 639; *Blennerhassett v. Sherman*, 105 U. S. 100, 117; 1 *Iredell Law* 490; *Hilliard v. Cagle, et al.*, 46 Miss.

The conclusion we reach is, that the application of the proceeds of the sale of the bankrupt's interest in this coal land to the debts and claims of Thos. Merriam, and, at his demand, to debts and claims upon which he was liable for the purpose of exonerating him, were preferential payments to Thos. Merriam for which his executors must account with interest, if that sum be necessary for the payment of all debts of every class which have been or may be proven against the bankrupt and the expenses of the trustee, his fees and the costs of the bankrupt cause. But only to the extent necessary to

the payment of claims, costs and expenses is there any equitable reason for recovering the preferential payment received by Thos. Merriam. The cause will be remanded and the decree so modified as to direct the ascertainment of the money necessary for the purposes indicated, whereupon to enter a decree against the executors of Thos. Merriam, for the sum thus settled, not however to exceed the amount applied by Thos. Merriam in payment of his own claims and that which by his insistence was applied in his exoneration as surety or endorser.

The costs of this appeal will be paid by the executors of Thos. Merriam.

373 And afterwards, to-wit: on the 26th day of May A. D. 1906 a record was filed in said United States Circuit Court of Appeals clothed in the words and figures following, to-wit:

374 No. 1570.

United States Circuit Court of Appeals, Sixth Circuit.

E. J. PAGE and ROBERT MARKERT, Executors of Thomas Merriam, Deceased, Appellants,

vs.

H. F. ROGERS, Trustee of I. B. Merriam, Bankrupt, Appellee.

In Bankruptcy.

Appeal from the District Court of the United States for the Eastern District of Tennessee.

Record.

Original Transcript Filed May 26, 1906.

375 *Transcript of Record.*

Term Caption.

April Term, 1904.

Be it remembered, That at a District Court of the United States begun and held for the Southern Division of the Eastern District of Tennessee at the Court Rooms in the City of Chattanooga within said District and the Sixth Circuit, on the First Monday, it being the 4th day of April, A. D. 1904. Present and presiding the Hon. C. D. Clark, District Judge. Among the proceedings had were the following, to-wit:

(Here follows order allowing trustee to file petition and granting restraining order. Filed 26th day of June, 1903.)

No. 517.

H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM ET AL.

In re Bankruptcy of I. B. MERRIAM.

In this cause it is ordered, on motion of petitioner that the petition be filed as prayed and that publication be made for defendants Thomas Merriam and the Tennessee Coal & Lumber Company requiring them and each of them to appear and answer said petition on or before the first Monday in ——, 1903.

It is further ordered that said defendants, Thomas Merriam and the Tennessee Coal & Lumber Company, and each of them, be restrained and inhibited from in any manner selling, transferring, conveying or encumbering the real estate described in said petition until further order of this court, it now appearing to the court that unless such restraining order is granted them there is danger of irreparable injury being caused to petitioner.

C. D. CLARK, *Judge.*

Here follows petition of H. T. Rogers, Trustee, filed June 26, 1903:

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

In re I. B. MERRIAM, Bankrupt.

To the Honorable C. D. Clark, Judge etc.:

H. F. Rogers, Trustee, a citizen and resident of Chatta-
376 nooga, Hamilton County, Tennessee, brings this, his petition, against Thomas Merriam, a citizen and resident of the State of New York, residing at Syracuse, New York, and the Tennessee Coal — Lumber Company, a corporation organized and existing under and by virtue of the laws of the State of New York and with his principal office in the city of Syracuse in said State, leave so to do having been first obtained from this court.

Petitioner respectfully shows to the court:

1. That on the — day of June, 1903, I. B. Merriam, a citizen and resident of Chattanooga, Tennessee, filed his voluntary petition in bankruptcy in this cause; that on the — day of June, 1903, he was duly adjudged a bankrupt, and that in the meantime petitioner has been duly appointed and elected and has duly qualified as trustee in this cause, and in such capacity he files this his petition.

2. In the schedule of assets attached to the petition in bankruptcy of said I. B. Merriam is set forth what purports to be all of the prop-

erty, real, personal and mixed belonging to said bankrupt, which property has since been duly appraised and is valued as follows:

The personal property, consisting of stock of merchandise and fixtures, value at about $1,100.

Accounts and bills receivable that are regarded fairly collectible from $1,000 to $1,500.

The real estate consists of property within the county of Hamilton, Tenn., and is valued at about $40,000.

The total liabilities set forth in the schedule of debts of said bankrupt aggregate the sum of $75,000.00 of which amount the aggregate amount of $38,000 is secured by a first mortgage on the real estate thereinbefore described. It is therefore manifest, on the showing of assets and liabilities set forth under the petition in bankruptcy filed by said bankrupt, that the general and unsecured creditors will practically receive nothing.

3. Petitioner however, charges that there are other and additional assets and of greater value to said bankrupt within the jurisdiction of this Honorable Court, which should be subjected to the payment of the debts of said bankrupt and which, for this purpose, should be impounded by this Court. The facts concerning this charge are as follows:

On or about the 1st day of June, 1903, said bankrupt, I. B. Merriam, was the owner of an undivided one-half interest in ten thousand acres of coal land situated in Cumberland County, Tennessee, valued at $20.00 per acre. This property, at the date before mentioned, was owned in common by said bankrupt and one G. H. Jarnigan, and had been *eso* held by them for many years.

377 On the date above mentioned, the said bankrupt executed and delivered to defendant, Thomas Merriam, his brother, a deed, conveying to him in fee simple, his interest in the coal lands above described and on the same date and about the same time, said Thomas Merriam purported to convey the same property to the defendant, The Tennessee Coal & Lumber Company, a corporation, which the said Thomas Merriam had organized for the purpose of taking title to said real estate and of which corporation the said Thomas Merriam was the principal stockholder. This trade was consummated in Syracuse, New York, on the date above mentioned, at which place the said bankrupt had gone for this purpose.

Immediately after this trade was closed, said bankrupt returned to his home in the City of Chattanooga, Tennessee, bringing with him two deeds just described, which deeds he immediately put of record in the county where said property is situated, and within a few days thereafter and as soon as the papers could be drawn, he filed his petition in bankruptcy in this cause.

4. Petitioner avers that the consideration expressed in the deed just described from said bankrupt to his brother defendant, Thomas Merriam, was a nominal consideration.

But the facts connected with said transfer were as follows:

For some years prior to this time, said bankrupt had been in failing circumstances and at no time had he been solvent within the meaning of the bankruptcy law. For the last four or five years, his

assets have practically remained the same as they were on or about the first day of June of this year as hereinbefore described, save and except that his stock of goods, he being a merchant, has continually decreased owing to his inability to secure credit, and the necessity to meet the interest charges on the indebtedness which he was owing.

Your petitioner is informed and believes and so charges that during this time and even as far back as 8 or 9 years ago, the defendant Thomas Merriam had been the financial backer of his brother, the said bankrupt, has loaned him money, has endorsed various paper of said bankrupt at bank and to various individuals.

Petitioner is not informed as to the extent of these advancements or those endorsements, but he understands that they aggregate a large sum.

During the last two or three years, the said bankrupt has had great difficulty in resisting the importunities of his creditors, in paying the interest charges on his debts at bank and otherwise, and to accomplish this purpose, has had frequently occasion to bor-
378 row money from his brother, defendant Thomas Merriam.

Of this condition of affairs, defendant Thomas Merriam was fully aware, he fully knew that said bankrupt was largely insolvent, and that at no time during the last three or four years would his property, at a fair valuation, pay at the most more than 40 or 50 per cent. of his liabilities.

The said bankrupt, for the purpose of gaining additional indulgences from his many creditors and to save himself from insolvent proceedings, has repeatedly and time and again during the last two years represented to his creditors that he was on the eve of selling his one-half interest in the coal lands hereinbefore described at the price of $20.00 per acre or thereabouts; that if unduly pressed by his creditors he would be prevented from making said sale, not only to his detriment but to their great loss, and that if permitted to take his own course he would succeed in disposing of said coal lands, and if in this he succeeded, he would be able to pay off his creditors in full.

Relying upon these assurances, the many creditors of said bankrupt have indulged him until the 1st day of June last, when said coal lands were transferred as hereinbefore described.

During this period petitioner is informed and charges that said bankrupt did make many and earnest efforts to sell his interest in said coal lands without success. During the last two or three years said bankrupt has renewed his assurances to the various creditors stating that he was about to sell out his coal lands as aforesaid, and that if they would wait upon him and not bring suit, that whenever said sale was consummated, he would pay their demands.

On or about the last day of May of this year, he informed various of his creditors that he had succeeded in disposing of his coal lands, and was going to New York for the purpose of closing the trade. Accordingly said bankrupt did go to New York as hereinbefore set forth and executed the deed hereinbefore described.

As a matter of -act petitioner charges that said bankrupt was paid nothing by Thomas Merriam, the defendant, for making the transfer aforesaid of said coal lands, and that said transfer was made wholly without a valuable consideration. That said grant and conveyance of the coal lands aforesaid was had, made and contrived of malice, fraud, covin and collusion to the intent and purpose to hinder and delay and defraud the creditors of said bankrupt of their lawful and just actions, suits, debts and acts, and therefore wholly null and void.

379 And, further, your petitioner charges that said Thomas Merriam took said conveyance from said bankrupt well knowing the fraudulent purpose and character thereof, and with the intent to aid said bankrupt to hinder, delay and defraud his other creditors, to-wit, *its* creditors of said bankrupt in this cause. And petitioner further avers that said conveyance was collusively made to this end and for the special benefit of said defendant Thomas Merriam and said bankrupt. As already averred, there was no cash paid at all in said transaction, and any consideration expressed in the deed or otherwise, was a mere device in furtherance of covin, collusion and fraud, whereby the defendants and said bankrupt were contriving to hinder and delay the other creditors of said bankrupt.

5. Petitioner further avers that the reasonable value of the interest conveyed as aforesaid by said bankrupt to his brother, defendant, Thomas Merriam, is the sum of $100,000. Petitioner charges that there was a secret agreement between said bankrupt and said Thomas Merriam, that the latter would give said bankrupt the sum of $75,000 for the latter's interest in said property, and this was the purchase price agreed upon between them. But as a matter of fact, not one dollar of said purchase price was paid by said Thomas Merriam to said bankrupt, but, on the contrary, the former pretended to withhold and appropriate to his own use and benefit the said purchase price of $75,000, and the same is now over due and unpaid. There is, therefore, due the estate of said bankrupt by said Thomas Merriam the sum of $75,000 on account of the unpaid purchase price for said lands, that said sum or unpaid purchase price is a lien upon the real estate thus conveyed and that it is a right of the creditors of said bankrupt to have said property impounded and said lien enforced and for this purpose to have the interest conveyed by said bankrupt to said Thomas Merriam sold by this Court to satisfy said lien, and it is further the right of petitioner as a representative of the creditors of said bankrupt to have a decree or judgment against defendant, Thomas Merriam for the full amount of the value of said property or the unpaid purchase price thereof.

Petitioner is further informed that defendant Thomas Merriam claimed that, while in fact he paid nothing to said bankrupt on account of the purchase of said property hereinbefore described, the agreed purchase *of said property hereinbefore described, the agreed purchase* price of $75,000 was appropriated in liquidation of

380 claims or demands that said defendant had against said bankrupt for money advanced to and endorsements made for said bankrupt.

And that, in this manner, said defendant consumed for his own use and benefit the total of the purchase price of said property.

Petitioner avers that if this be true, it is also true that, at the time said appropriation was made, said defendant, Thomas Merriam, not only had reasonable cause to believe that his brother, the said bankrupt, was actually insolvent but in fact knew that he was insolvent. Not only that he had reasonable cause to believe that by said transaction it was intended to give a preference to said defendant, but he actually knew that thereby he did in fact obtain a preference.

Therefore petitioner further avers that said appropriation by said defendant of the purchase price of said real estate is void and an unlawful preference in the bankruptcy act, and that petitioner has the right to have said unlawful preference set aside and declared null and void and the property aforesaid impounded and administered in this Court for the benefit of the lawful creditors in this cause.

7. Petitioner is informed and believes and so charges that the Tennessee Coal & Lumber Company, defendant, was organized by defendant Thomas Merriam at the time the transfer aforesaid was made and for the purpose of taking title as quickly as possible to the property thus conveyed. That the principal stockholder in said corporation is Thomas Merriam. That said corporation is not an innocent purchaser for value of the property hereby described and conveyed as hereinbefore mentioned by said Thomas Merriam to said corporation. But that said corporation took title from said Thomas Merriam with full knowledge of the circumstances hereinbefore set forth and in fact paid nothing to said Thomas Merriam for said conveyance further than to issue to him certain paid up stock.

Petitioner therefore charges that if said corporation has title to said property it takes said title subject to all liens and demands that petitioner has under the facts hereinbefore charged against defendant Thomas Merriam and subject to all liens and equities and rights and demands belonging to petitioner in the premises.

8. Petitioner further charges that as a matter of fact said defendant corporation has no title whatever to said property. He charges that said defendant is a foreign corporation as hereinbefore described.

That at the time the transfer hereinbefore mentioned was made to it by said defendant Thomas Merriam, said corporation
381 had failed to comply with the laws of Tennessee governing foreign corporations in that said defendant had not filed a copy of its charter with the Secretary of State at Nashville, Tenn., and had not filed an abstract of said charter in the register's office of the county in which said lands are located.

And petitioner further charges that defendant company has not since that time filed copy of its charter or abstracts of its charter as required by the laws of said state, and therefore under the laws of Tennessee said corporation is incapable of taking title to the property, and that said title is still in defendant Thomas Merriam, sub-

ject to all of the equities, claims and demands hereinbefore set forth and described.

9. Petitioner says that a more particular description of the coal lands hereinbefore mentioned is as follows:

The following described real estate lying in county of Cumberland, and State of Tennessee, consisting of two tracts of land, to-wit:

First Tract. All of the land conveyed by Grant No. 23,822 issued by the State or Tennessee to Robert Burke and Elijah Haley on the 7th day of June, 1841, the courses and distances of said land described in said grant being as follows:

Beginning at a white oak marked E. H. standing on the line that divides the counties of Morgan and Bledsoe; thence with the meanders of the county line, the several courses being south 70 east, passing Robert Burke's house at the Crab Orchard at 320 poles, in all 1600 poles, to a white oak marked R. B. on the County line; thence north 50 degrees east crossing Fall creek 120 poles; in all 352 poles to a black oak, black gum and hickory; thence north 20 deg. East 148 poles to a white oak marked P. H.; thence north 20 deg. West crossing a branch at 20 poles, in all 726 poles, to a chestnut oak on the point of a ridge; thence north 65 deg. west 510 poles to a white oak marked P. M. C. and four white oak pointers, this line crossing the Waller Branch at Staples' Camp; thence a direct line to the beginning. The calls of this survey include 7500 acres out of which is taken by prior claims 2500 acres, leaving a balance of 5000 acres.

Second Tract. All the land conveyed by Grant No. 23,823 issued by the State of Tennessee to Robert Burke and Elijah Haley on June 17, 1841, the courses and distances of said lands, as described in said grant, being as follows:

Beginning on a white oak marked E. H. on the county line between Morgan and Bledsoe counties, it being the beginning corner of a survey made by Burke and Haley on entry No. 2444;
382 thence with the county line North 60 deg. West 820 poles to a stake 10 poles north of John Kimmer's house; thence north 40 deg. west on the county line 354 poles to a white oak, corner to the Lane and Eastland survey; thence north 25 deg. East 380 poles to a white oak marked L. thence south 60 east crossing the trail that leads from John Kimmer's to Jesse Mumford's at 220 poles, in all 404 poles, to a Spanish oak marked P. C. and pointers, thence south 30 deg. East 298 poles to a white oak marked P. M. C.; thence south 80, east 156 poles to a white oak marked P. S. and pointers; thence north 10 deg. East 128 poles to three white oaks growing from one root; thence north 60 deg. east 114 poles to a hickory in a flat north of a pine thicket; thence due east crossing Daddy's creek 284 poles to a large white pine marked E. G. H.; thence north 60 deg. East 74 poles to a white pine marked R. B.; thence north 67 deg. East 580 poles to a white oak, last corner of a survey on Entry No. 2444; thence a direct line to the beginning.

Prayer.

Premises considered, Petitioner prays:

For leave to file this petition in this cause or as an independent bill.

1. That defendants Thomas Merriam and the Tennessee Coal & Lumber Company be made parties to this cause by publication in the manner provided by the acts of Congress.

2. That a decree of judgment be rendered declaring that the sale or transfer of the property hereinbefore described, made by the bankrupt be declared null and void, because the same was made in fraud of the rights of the creditors of said bankrupt. And that said property be decreed the property of said bankrupt and seized and taken possession of by this court and sold under the orders of this court for the benefit of said creditors in this cause.

3. That if petitioner be mistaken in his rights in the premis s, then in the alternative he prays that a decree be rendered against the defendant for the purchase price of said property, to-wit; the sum of $75,000. That the same be declared a lien upon the property aforesaid and that said property be impounded by this Court and sold under orders of this Court to enforce said lien for the benefit of the creditors of this cause.

4. That the appropriation by said Thomas Merriam of the purchase price of said property, to-wit; the sum of $75,000, in satisfaction and payment of demands that he had against the bankrupt in this cause for money loaned said bankrupt, and for en-
383 dorsement made for the benefit of said bankrupt be declared null and void as an unlawful preference under the bankruptcy laws, in that said defendants at the time said appropriation was made intended thereby to obtain a preference and did thereby obtain a preference over other creditors, the said bankrupt being then insolvent within the knowledge of said bankrupt and within the knowledge of said defendants and to the extent of $75,000, a lien be declared on the property aforesaid for the benefit of the creditors in this cause and that said property be impounded to the end that said lien may be enforced and sold for the benefit of said creditors. And that a decree or judgment be rendered against said defendants to the extent of the said amount to-wit: of $75,000.

5. That the transfer of said property to defendants in satisfaction of their claims or demands as creditors against the bankrupt in this cause be declared an unlawful preference within the meaning of the bankruptcy act in that at the time it was made said bankrupt was insolvent within the knowledge of said bankrupt and defendants. And with this knowledge or having reasonable cause to believe the same, they took said property with the intent and with the effect of obtaining a preference under the bankruptcy laws.

And that said transfer be set aside and the property in question impounded as the property of the bankrupt in this cause, and the same be sold under the orders of this Court for the benefit of the creditors of said bankrupt therein.

6. That an injunction issue restraining the defendants and each

of them from in any manner encumbering the title to said property or transferring the same to any person or corporation until the final decree in this cause.

7. That petitioner have such other, further and general relief as he may be entitled to under the premises. The answer under oath of defendants is hereby expressly waived.

H. F. ROGERS, *Trustee.*
PRITCHARD & SIZER,
WILLIAMS & LANCASTER,
Solicitors for Trustee.

H. F. Rogers upon oath says that he is the duly appointed and qualified trustee in bankruptcy in this cause; that the facts stated in the petition are true of his own knowledge and those upon information and belief he believes to be true.

H. F. ROGERS.

Subscribed and sworn to before me this 26th day of June, 1903.
D. L. GRAYSON, *Referee.*

384 Endorsed: Filed June 26th, 1903. Jno. D. Key, Deputy Clerk.

(Here follows order granting restraining order, etc., filed June 27th, '03.)

In the District Court in and for the Southern Division of the Eastern District of Tennessee.

No. 517.

H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM ET AL.

In re Bankruptcy of I. B. MERRIAM.

Whereas on the 26th day of June, 1903, petition was filed in this cause by H. F. Rogers, Trustee, against Thomas Merriam and the Tennessee Coal & Lumber Company both non-residents of the State of Tennessee, which said petition prays to seize and impound and to enforce a legal and equitable lien upon and claim to the following real estate in the County of Cumberland and State of Tennessee, to-wit:

An undivided one-half interest in and to the following:

First Tract. All the land covered by Grant No. 23,822 issued by the state of Tennessee, to Robert Burke and Elijah Haley on the 7th day of June, 1841, the courses and distances of said lands as described in said grant being as follows:

Beginning at a white oak marked E. H. standing on the line that divides the counties of Morgan and Bledsoe thence with the mean-

ders of the county line, the several courses being south 70 east, passing Robert Burke's house at the Crab Orchard at 320 poles, in all 1,600 poles to a white oak marked R. B. on the county line; thence north 50 degrees east, crossing Fall creek at 120 poles, in all 352 poles to a black oak, black gum and hickory; thence north 20 degrees east 148 poles to a white oak marked P. H.; thence north 20 degrees west crossing a branch at 20 poles, in all 726 poles, to a chestnut oak on the point of a ridge; thence north 65 degrees west 510 poles to a white oak marked P. M. C. and four white oak pointers, this line crossing the Waller branch at Staples' camp; thence a direct line to the beginning. The calls of this survey include 7,500 acres out of which is taken by prior claims 2,500 acres, leaving a balance of 5,000 acres.

Second Tract. All the land covered by grant No. 23,823, issued by the state of Tennessee to Robert Burke and Elijah Haley on June 17th, 1841, the courses and distances of said lands, as described in said grant, being as follows:

385 Beginning on a white oak marked E. H. on the county line between Morgan and Bledsoe counties, it being the beginning corner of a survey made by Burke and Haley on Entry No. 2,444; thence with the county line north 60 degrees west 820 poles to a stake 10 poles north of John Kimmer's house; thence north 40 deg. west on the county line 354 poles to a white oak, corner to the Lane and Eastland survey; thence north 35 degrees east 380 poles to a white oak marked L, thence south 60 east crossing the trail that leads from John Kimmer's to Jesse Mumford's at 220 poles, in all 404 poles, to a Spanish oak marked P. C. and pointers; thence south 30 degrees east 298 poles to a white oak marked P. M. C. thence south 80 east 156 poles to a white oak marked P. S. and pointers; thence north 10 degrees, east 128 poles to three white oaks growing from one root; thence north 60 degrees east 114 poles to a hickory in a flat north of a pine thicket; thence due east crossing Daddy's creek 284 poles to a large white pine marked E. G. H.; thence north 60 degrees east 74 poles to a white pine marked R. B.; thence north 67 deg. east 580 poles to a white oak; last corner of a survey on Entry No. 2,444; thence a direct line to the beginning.

Now therefore it is ordered by the court that said Thomas Merriam and the Tennessee Coal & Lumber Company, defendants in said petition be required to appear, plead, answer or demur to said petition on or before the first day of September next, or the said petition will be taken as confessed as to said defendants.

It is further ordered by the court that pending the hearing on said petition the said defendant, Thomas Merriam and the Tennessee Coal & Lumber Company, and each of them be, and they are hereby restrained and enjoined and inhibited from selling, transferring or in any manner disposing of or encumbering the real estate described herein.

It is further ordered by the court that a copy of this order be forthwith served on said non-resident defendants by the marshal of the District Court of the United States in and for the Northern Division

of the state of New York. It appearing that both of said non-resident defendants are residents or inhabitants of said Northern District of the state of New York.

It is further ordered by the court that the order of publication heretofore made in this cause be for the present suspended.

Enter this.

CLARK, *J.*

386 (Here follows answer of Thomas Merriam to petition of H. F. Rogers, trustee, filed Aug. 1st, 1903.)

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

In re I. B. MERRIAM, Bankrupt.

H. F. ROGERS, Trustee, Petitioner,
vs.
THOMAS MERRIAM and TENNESSEE LUMBER AND COAL COMPANY.

The defendant, Thomas Merriam, a citizen and resident of the state of New York, residing at Syracuse, N. Y., for himself only answers the bill of complaint and petition of the complainant above named, H. F. Rogers, trustee, and respectfully shows to the court:

That said defendant, Thomas Merriam, has no knowledge as to the allegations contained in the petition herein of the filing of a voluntary petition in bankruptcy by I. B. Merriam, or as to his adjudication as a bankrupt, or as to the appointment and election and qualification of the petitioner as trustee in this cause.

Defendant Thomas Merriam alleges that he has no knowledge of the filing of a schedule of assets attached to the petition in bankruptcy of said I. B. Merriam, or as to whether or not such alleged schedule sets forth what purports to be all of the property, real, personal and mixed, belonging to said bankrupt.

Said defendant also denies any knowledge as to whether or not the property mentioned in said alleged schedule has been duly appraised or as to what its value is, or as to the liability set forth in said schedule, or as to the alleged fact that it is manifest on the showing of assets and liabilities set forth under the petition in bankruptcy filed by said bankrupt, that the general and unsecured creditors will receive nothing.

Defendant, upon information and belief, denies that there are other and additional assets of said bankrupt within the jurisdiction of this honorable court which should be subjected to the payment of the debts of said bankrupt, and denies that there are any assets of said bankrupt within the jurisdiction of this honorable court or elsewhere other than those stated and set forth in the schedule annexed to the petition of I. B. Merriam, bankrupt, and referred to in the petition in this proceeding.

Defendant Thomas Merriam admits that said bankrupt, I. B. Merriam, was, on or about the first day of June, 1903, the owner

of an undivided one-half interest in ten thousand acres of
387 coal lands or in any other number of acres of coal lands situate in Cumberland county, Tennessee, or elsewhere. But defendant alleges that said title was incumbered to amount of more than $40,000, by two several trust deeds, one for the benefit of the defendant to secure him to the extent of $35,000, given by said I. B. Merriam to Thomas Merriam as trustee, and dated and delivered on or about April 11th, 1899; and one for the benefit of the First National Bank of Chattanooga, to secure said bank to the extent of $4,000, the date of which deed is unknown to this defendant.

Defendant admits that on or about the first day of June, 1903, said bankrupt, I. B. Merriam and his wife, —— Merriam, jointly with G. H. Jarnigan and wife executed and delivered to this defendant, for a full, adequate and present fair consideration, a deed conveying to defendant the interest of said I. B. Merriam and G. H. Jarnigan in the coal lands mentioned in said petition.

Defendant admits that on or about the same date, this defendant conveyed the said property to the Tennessee Lumber & Coal Company, a corporation duly organized and existing under the laws of the state of New York.

Defendant denies that he was the principal stockholder in said corporation.

Defendant admits that the transfer and conveyance of said lands to this defendant was consummated in Syracuse, N. Y., and thereafter said I. B. Merriam left the city of Syracuse, N. Y., and defendant verily believes returned to his home in the city of Chattanooga, Tennessee.

Defendant admits that the deeds above mentioned were shortly thereafter placed on record in the county of Cumberland, Tennessee, where said property is situated.

Defendant denies that the consideration expressed in the deed was a nominal consideration.

Defendant has no knowledge or information sufficient to form a belief as to whether or not said bankrupt has been in failing circumstances for some years prior to June 1st, 1903, or as to whether or not he has been solvent within the meaning of the bankrupt law or as to whether or not, for the last four years or five years, the assets of said bankrupt have practically remained the same as they were on or about the 1st day of June, 1903, or as to whether or not his stock of goods has continually decreased owing to his inability to secure credit and the necessity to meet the interest charges on the indebtedness which he was owing, or for any other reason.

Defendant therefore denies each and every of said allega-
388 tions.

Defendant admits that he has loaned the said I. B. Merriam various sums of money from time to time and has endorsed various notes of said bankrupt, but denies that he has been, or been understood to be, the financial backer of said I. B. Merriam.

Defendant has no knowledge or information sufficient to form a belief as to whether or not said bankrupt has had great difficulty

in resisting the importunities of his creditors, in paying the interest charges on his debts at bank and otherwise, and to accomplish this purpose has had frequently occasion to borrow money from this defendant. Therefore this defendant denies said allegation.

Defendant denies that he was fully aware of the alleged condition of the financial affairs of said bankrupt, or that he fully knew that said bankrupt was largely insolvent or that at no time during the last three or four years would his property, at a fair valuation, pay at most, more than forty or fifty per cent. of his liabil[illegible].

Defendant therefore denies said allegations and ea[illegible] of them and the whole thereof.

Defendant has no knowledge or information sufficient to form a belief as to whether or not said bankrupt, for the purpose of gaining additional indulgence from his many creditors and to save himself from insolvent proceedings, has repeatedly and time and again, during the last two years represented to his creditors that he was on the eve of selling his half interest in the coal lands in said petition mentioned at the price of $20.00 per acre or thereabouts and that if unduly pressed by his creditors he would be prevented from making said sale not only to his detriment but to their great loss, and that if permitted to take his own course he would succeed in disposing of said coal lands, and if in this he succeeded he would be able to pay off his creditors in full.

Defendant therefor- denies said allegation and the whole thereof.

Defendant alleges that he has no knowledge or information sufficient to form a belief as to whether or not the creditors of said bankrupt relied upon the assurances of said bankrupt and indulged him until the first of June last. Defendant therefore denies said allegation and the whole thereof.

Defendant admits that said bankrupt did make many and earnest efforts to sell his interest in said coal lands without success.

Defendant has no knowledge or information sufficient to form a belief as to whether or not, during the last two or three years,
389 said bankrupt has renewed his assurances to the various creditors stating that he was about to sell his coal lands as aforesaid, and that if they would wait upon him and not bring suit that whenever said sale was consummated he would pay their demands.

Defendant therefore denies said allegation and the whole thereof.

Defendant emphatically denies the allegation in said petition which charges that said bankrupt was paid nothing by this defendant for making the transfer of said coal lands, and that said transfer was made wholly without a valuable consideration.

Defendant emphatically denies the allegation in said petition which alleges that the grant of conveyance of the coal lands to defendant, which is referred to in said petition, was had, made or contrived of malice, fraud, covin or collusion or with the intent or purpose to hinder, delay or defraud the creditors of said bankrupt of their lawful and just actions, suits, debts and acts, and said defendant further denies that the said deed is either wholly or in part null and void.

Defendant emphatically denies the allegations in said petition which charges that this defendant took said conveyance from said bankrupt well knowing the alleged fraudulent purpose and character thereof or with the intent to aid said bankrupt, to hinder, delay or defraud his other creditors, to wit, the creditors of said bankrupt in this cause.

Defendant denies in toto the allegation in said petition which avers that the said conveyance was collusively made for the purpose of defrauding any of the creditors of said bankrupt or for the special benefit of this defendant.

Defendant emphatically denies the allegation in said petition wherein it is averred that there was no cash paid at all in said transaction or that the consideration expressed in said deed or otherwise was a device in furtherance of covin, collusion and fraud whereby defendant and said bankrupt were contriving to hinder and delay the other creditors of said bankrupt, and this defendant affirmatively avers that said conveyance was made in good faith and for a present fair consideration as will more fully be made to appear hereafter.

Defendant denies that reasonable value of the interest conveyed by said bankrupt to this defendant is the sum of $100,000.

390 Defendant denies that there was a secret agreement between said bankrupt and this defendant that this defendant would give said bankrupt the sum of $75,000 for the latter's interest in said property, and defendant affirmatively avers that there was no secret agreement of any kind between said bankrupt and this defendant.

Defendant denies the allegation of said petitioner that not one dollar of the purchase price of consideration for said transfer was paid by this defendant to said bankrupt, or that this defendant pretended to withhold to his own use and benefit the said purchase price of the sum of seventy-five thousand dollars or that the same is now over due and unpaid.

Defendant denies that there is due to the estate of said bankrupt from this defendant the sum of seventy-five thousand dollars on account of the unpaid purchase price for said lands, or any other sum.

Defendant denies that he claims or has claimed that "while in fact he paid nothing to said bankrupt on account of the purchase of said property hereinbefore described, the agreed purchase price of seventy-five thousand dollars was appropriated in liquidation in claims or demands and that said defendant had against said bankrupt for money advanced to and endorsements made for said bankrupt. And that in this manner said defendant consumed for his own use and benefit the total of the purchase price of said property."

Defendant denies that he had reasonable cause to believe that his brother, I. B. Merriam, was insolvent or that he knew said I. B. Merriam was insolvent.

Defendant denies that by said transaction it was intended to give a preference to this defendant, and defendant denies that he actually knew that thereby he did in fact obtain a preference.

Defendant affirmatively alleges that he not only did not know

that he was obtaining a preference over other creditors of his brother, I. B. Merriam, but that he had no reasonable cause to believe that said I. B. Merriam was insolvent. That he had no knowledge or suspicion that he was insolvent at the time of this transaction, but on the contrary, understood and verily believed the said I. B. Merriam had money sufficient to pay all debts and demands owed by him.

Defendant denies that the Tennessee Lumber and Coal Company was organized by him at the time the transfer aforesaid was made, and denies that the same was organized for the purpose of taking title as quickly as possible to the property conveyed.

391 Defendant denies that he is the principal stockholder in said corporation.

Defendant denies that said corporation took title from defendant with full knowledge or with any knowledge of the alleged circumstances set forth in the petition herein.

Defendant admits that said Tennessee Lumber and Coal Company is a foreign corporation, but alleges that it has filed a copy of its charter with the secretary of the state of Tennessee at Nashville, Tennessee, and has filed an abstract of said charter in the register's office in the county of Cumberland, that being the county in which the lands in question are located.

Defendant further alleges that said company has complied in every respect with the requirements of the laws of the state of Tennessee covering foreign corporation, and is duly qualified and authorized to take title to the property and to do business with said state.

Defendant further alleges affirmatively by way of defense to said petition that the facts concerning the transactions between this defendant and said bankrupt are as follows:

That this defendant has loaned from time to time since during or about the year 1892, to said I. B. Merriam various sums of money and has endorsed various notes for said I. B. Merriam.

That during the summer of 1897, the said I. B. Merriam executed and delivered to the trustee therein named for the benefit and security of this defendant a trust deed conveying all his interest in the lands mentioned in said petition herein for the sum of twenty-five thousand dollars which trust deed was executed, delivered and accepted as and for a complete and continuing security to this defendant for any and all sums of money which he might loan to said I. B. Merriam and as and for a continuing security to this defendant for any liability which he might incur by reason of endorsing notes or other commercial paper for said I. B. Merriam.

That thereafter and on or about the 11th day of April, 1889, said bankrupt executed and delivered to this defendant for the security of defendant another trust deed conveying the same property which was and was intended to be continuing security for the benefit of this defendant for any endorsements which he might make for said I. B. Merriam and for any and all sums of money which he might loan him to the amount of $35,000.00 and interest.

392 And said deed was thereafter delivered by this defendant to the trustee therein named, in said month of April, 1899.

That this defendant loaned to and endorsed for said I. B. Merriam from time to time to the amount of $55,000.00.

That said I. B. Merriam had endeavored repeatedly to sell said coal lands, but without success. That during or about the month of December, 1902, defendant entered into an agreement with said I. B. Merriam, by the terms of which the defendant was to enter into possession of said premises and negotiate a sale of the same if possible, and out of the proceeds of said sale, first pay himself the amount due for money loaned and take up such paper as he was liable on as endorser and for all of which he was secured by the trust deed aforesaid.

That in pursuance of said arrangement this defendant made a sale of said premises, took title thereto from said I. B. Merriam and out of the purchase price of $65,000.00 paid the debt to him, this defendant, and notes on which he was accommodation endorser in bank of Syracuse to the amount in all of $42,000.00, or thereabouts, and paid over to said I. B. Merriam in cash the sum of $25,032.00 or thereabouts. That after said transaction was completed, defendant was informed by his said brother, I. B. Merriam, that he was not going to have sufficient money to pay all of his debts and the defendant enquired of his said brother as to the amount he would require in addition and was told that he would require ten thousand dollars and that with said sum he could pay all his creditors and would be in comfortable circumstances and could keep his Chattanooga real estate. That thereupon this defendant loaned to said I. B. Merriam the sum of ten thousand dollars in addition to the $25,032.00 which he has turned over to him out of the proceeds of said property.

Further answering the petition and bill of complaint herein this defendant affirmatively alleges that prior to the filing of the petition in bankruptcy herein he has no knowledge of the insolvency of said I. B. Merriam and has no reasonable cause to believe, and in fact did not believe or suspect that said I. B. Merriam was insolvent or not able to pay his just debts in full. That for the lands referred to in the petition herein this defendant paid a full, fair present consideration and obtained no unlawful preference over the other creditors of said I. B. Merriam and never sought to obtain any such unlawful preference over the other creditors of said I. B. Merriam and never sought to obtain any such unlawful preference. That the lands to which this defendant so took title were lands upon which this defendant had perfect security and a valid lien under and by virtue of the trust deeds hereinbefore referred to and as to which lands no other creditors had or could acquire any lien or title whatever.

393

Wherefore defendant prays that the petition and bill of petitioner and complaint herein be dismissed with costs and that it be adjudged that this defendant obtained no unlawful preference as against the creditors of said I. B. Merriam and that defendant obtained from said I. B. Merriam a perfect title to the lands described in the petition herein.

THOMAS MERRIAM.

BROWN & SPURLOCK,
Solicitors for Respondent.

(Here follows "Order releasing Ten. Co." Filed Aug. 1, '03.)

No. 517.

H. E. ROGERS, Trustee in Bankruptcy of I. B. Merriam,
vs.
THOS. MERRIAM and THE TENN. LUMBER & COAL COMPANY.

Be it remembered that on this 1st day of August, 1903, before the Hon. Chas. D. Clark, Judge, etc., this case was presented upon the written stipulation of the parties; and the execution of said stipulation being admitted and established in open court, the same is ordered to be spread of record, and is in words and figures following, to wit:

It is agreed that the petition be dismissed as to the defendant Tennessee Lumber and Coal Company, the petitioner hereby releasing and abandoning any right to recover against said corporation and any right to impeach its title to the lands described in the petition and conveyed to it by Thomas Merriam, agreeing to look to the personal responsibility of Thomas Merriam in lieu of the land, but otherwise reserving all its rights against defendant Thomas Merriam and I. B. Merriam.

This dismissal and release is not to affect any grounds of recovery petitioner may have as against said two last named defendants, but only to release the defendant corporation from any claim of liability and release any question as to its title to said land.

The dismissal of this bill as to said corporation is upon the condition that said Thomas Merriam does enter his appearance as defendant to this suit. It is further agreed that this stipulation
394 is not to become binding until notice from petitioners that they are satisfied as to the solvency of said defendant and until the same has been submitted to the said Thomas Merriam and ratified by him.

This 11th day of July, 1903.

BROWN & SPURLOCK,
Att'ys for Tenn. Lumber & Coal Co.
PRITCHARD & SIZER,
WILLIAMS & LANCASTER,
Att'ys for Petitioner."

And it appearing to the court that the defendant, Thos. Merriam, has, in accordance with the terms of said stipulation, filed his answer to the petition in this case, and that the petitioner, after due investigation, has agreed to release and abandon any right to recover against the defendant, the Tenn. Lumber & Coal Company, and any right to impeach the title of said corporation to the lands described in the petition and conveyed to said corporation by Thos. Merriam, and to look alone to the personal liability of the defendant, Thos. Merriam, it is now, in consideration of the premises and by consent of parties, ordered, adjudged and decreed by the court that the petition be, and the same is hereby dismissed as to defendant, The Tenn. Lumber & Coal Company, and that said defendant go hence.

And it is further ordered, adjudged and decreed by the court (the petitioner consenting as hereinbefore set out), the petitioner representing himself as trustee, and the creditors of the estate of I. B. Merriam, bankrupt, have no further charge, demand or claim against the said defendant, The Tenn. Lumber & Coal Company, or its estate.

Enter this.

CLARK, *J.*

O. K.
P. & S.
BROWN & SPURLOCK.

(Here follows "Decree *vs.* Thos. Merriam, Est., and Order of Reference. Filed July 2d, 1904.")

H. F. ROGERS, Trustee, etc.,
vs.
THOMAS MERRIAM ET AL.

In re I. B. MERRIAM, Bankrupt. No. 517.

Be it remembered that this cause came on to be heard on this, the 19th day of July, 1904, before the Hon. C. D. Clark, Judge, etc., upon the pleadings, proof, stipulations of parties, together with the briefs and arguments of counsel for the complainant and defendant.

395 From all of which, the court is of the opinion, and so adjudges, that at the time of the sale and conveyance by I. B. Merriam, the bankrupt, of his Cumberland County coal lands to the defendant, Thomas Merriam, he, the said bankrupt, was and had been for several years insolvent; and that this insolvency was well known to the defendant, Thomas Merriam, the vendee of the land in question.

It is therefore adjudged and decreed that the appropriation of the proceeds of said sale by said vendor and vendee to the payment of the debts due by the former to the latter, or upon which the latter was endorser for the former, constituted an unlawful preference contrary to the terms and provisions of the bankrupt law, and said payments are therefore set aside, and the proceeds of said sale are hereby ordered to be paid over to the complainant as trustee for the benefit of the creditors of said I. B. Merriam, to an amount necessary to satisfy their allowable claims and the costs of the proceedings.

It is further decreed, for reasons assigned in the opinion of the court, that the defendant, Thomas Merriam, had no right to appropriate any part of the proceeds of said sale to the payment of the unregistered mortgage for $35,000.00, and set up and relied upon in the answer filed in this cause.

And it further appearing to the court that since the hearing of this cause, the said defendant, Thomas Merriam, has died, leaving a last will and testament, and that there have been appointed thereunder, as executors of his estate, E. J. Page and Robert C. Markert, and that said executors have appeared herein and submitted to the

jurisdiction of this court, and agreed that such decree as the court might have pronounced in favor or against the said Thomas Merriam, if he were still alive, may be pronounced in favor of or against them, as such executors.

It is therefore ordered, adjudged and decreed that this cause be referred to D. L. Grayson, as Special Master, to hear proof and report:

1. What debts have been filed against the estate of said bankrupt which have been allowed, or are allowable, as valid claims against said estate.

2. What amount it will be necessary for the executors aforesaid to pay into court out of the proceeds of said sale to satisfy said claims.

Said Master will give notice to each party to the suit of the
396 time and place of taking proof and make his report to this court at as early a day possible. He will also report that was I. B. Merriam's part of the amounts due T. A. Wright and the Chattanooga Savings Bank, herein decreed as prior and valid liens on the Cumberland county coal lands, at the time of their sale.

Enter this.

CLARK, *J.*

(Here follows deposition of I. B. Merriam, filed August 30, 1904.)

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM ET AL.

On Reference.

Deposition of I. B. Merriam, Taken by Agreement, in the Presence of D. L. Grayson, Commissioner; George Lancaster and Robert Pritchard, Attorney- for Plaintiff; Frank Spurlock, Attorney for Defendant.

Witness being called and sworn, on behalf of defendant, deposed as follows:

Examination by Mr. SPURLOCK:

Q. I hand you a list of the debts scheduled in your bankruptcy proceedings, and ask you to state on which of said debts you made payments within the four months before your petition was filed, and the amount paid on each debt?

A. I file herewith, marked Exhibit "A" a list of all payments made by me on the debts referred to.

Q. Please state which ones of the creditors named in this list of payments resided in Chattanooga, or had agents who represented them and lived in the city?

A. J. F. Loomis, First National Bank, Brooks Oil Company, Thomas Merriam, I. B. Merriam, Jr., Graham Brothers, Fritss & Wiehl, Glover & Brady, J. R. Baylor.

Q. Is N. H. Grady, whose deposition was taken in this cause, a member of the firm of Glover & Grady, to whom the $140.00 was paid?

A. Yes.

Q. I. B. Merriam, Jr., is a son of yours?

A. Yes.

Q. Was he a member of your firm?

A. No, sir.

Q. Was he connected with your firm in any way?

A. Yes, bookkeeper.

Q. Was Thomas Merriam a member of the firm?

A. No, sir.

397 Q. Was he connected with the business in any way?

A. He traveled for it.

Q. Who is the president of the First National Bank?

A. T. G. Montague.

Q. Is he the same Montague whose deposition was given in this cause?

A. He is.

Q. I will ask you to state what was the consideration of the note or debt scheduled in behalf of B. E. Tatum for $275.76?

A. A note given to Mr. Tatum for fee for presenting the claim of Mrs. S. O. Vann.

Q. What services were rendered in your behalf for that debt?

A. Mr. Tatum presented the notes that Mrs. Vann had against me for payment, and he extended the time on the notes.

Q. Was he employed by you as your attorney or representative?

A. He was employed by Mrs. Vann.

Q. Was there any other notes besides these, or any payments made to him, in the same consideration?

A. Yes, sir; I paid him about, I think, $1,000, besides this note.

Q. Was he the same B. E. Tatum who gave a deposition in this case in behalf of plaintiff?

A. Yes, sir.

Q. How long had he been representing Mrs. Vann as her attorney?

A. I think about four years.

Q. Will you examine your checks, notes and books, and file a statement showing the total amount paid to Mrs. Vann's attorney?

A. Yes, sir.

Q. Were you intimately and well acquainted with J. F. Loomis?

A. Yes, I had known him about 27 years.

Q. Is he doing business here?

A. Yes, lumber business.

Q. You had had business dealings and relations with him for a long time?

A. Yes, sir.

The trustees, by attorneys, comes and excepts to the foregoing deposition, and without desiring to appear as resisting any inquiry into the condition of the estate, or desiring to suppress any
398 facts tending to show any unlawful preferences, shows that the creditors, whose claims are referred to in the foregoing deposition, are not, as the trustee is advised, represented by the trustee, so far as the question of establishing their claims is involved, but that in case of contest, the attitude of the trustee is antagonistic to creditors, and, moreover, that the claims of said creditors have already been proved and allowed against the estate, and, as the trustee is advised, this proceedings is ancillary to the bankrupt proceedings, and the creditors are not parties, so far as any dispute concerning their claims, on any question of their liability to refund payments received by them may be made, and if they are, these are matters concerning which they must represent themselves.

Wherefore the trustee excepts to the whole of the foregoing deposition, because it concerns matters wholly beyond the scope of the pleadings and issues in this case, and beyond the scope of the reference.

GEORGE D. LANCASTER,
ROBERT PRITCHARD,
Attorneys.

It is agreed, to save costs of taking depositions, that the commissioner may look to the record, proceedings and proof in the bankruptcy case of I. B. Merriam, for the purpose of ascertaining the debts, and that the lists of debts aforesaid, shall be treated as established by the evidence, when so made out from the record, proceedings and proof aforesaid, shall be treated as established by the evidence, for the purposes of this reference.

EXHIBIT "A."

J. F. Loomis, payment on note		$150 00
Blue Grass Canning Co. Apl. 30, 1903		20 00
Mrs. S. O. Vann		402 02
Feb. 23	38 01	
Mch. 20	38 01	
Apr. 23	38 01	
May 25	38 01	
June 6	250 00	
The Williams Bros. Co.		73 02
First National Bank		14,683 98
March 16	10 00	
March 26	20 00	
April 6	50 00	
April 12	10 00	
May 14	200 00	
June 2d	3,298 47	
June 2d	4,000 00	

399	June 2d	3,500 00	
	June 2d	2,500 00	
	June 3d	500 00	
	June 3d	500 00	
	June 8th	39 00	
	June 8th	20 00	
	June 8th	35 51	
American Syrup and Preserving Co.			285 28
	Feb. 18th	71 47	
	Mch. 24th	41 85	
	Apr. 3d	42 00	
	Apr. 5th	105 81	
	Apr. 6th	77 84	
	Apr. 12th	77 84	
	May 18th	78 50	
	May 27th	59 78	
Brooks Oil Company			100 00
National Enameling & Stamping Co., Mch. 28th			50 00
Thomas Merriam			345 57
Isaac B. Merriam, Jr			172 26
Graham Brothers, Feb. 26th			25 00
Great Western Cereal Company, May 28th			59 00
Fritts & Wiehl, June 2d			61 67
Greenville Tobacco Mfg. Co., March 25th			62 70
Glover & Grady, June 24			140 00
J. R. Baylor, June 2d			10 00
Penn & Watson			50 00

(Here follows report of D. L. Grayson, Commissioner, filed August 30, 1904.)

District Court of the United States, Southern Division of the Eastern District of Tennessee.

In Bankruptcy. No. 517.

THOMAS MERRIAM
vs.
H. F. ROGERS, Trustee.

Report of D. L. Grayson, Commissioner, to the Hon. C. D. Clark, Judge.

The undersigned Commissioner, to whom the above case was referred on the 2d day of July, 1904, to ascertain and report.

First. What debts had been filed against the estate of said bankrupt which had been allowed or are allowable as valid claims against said estate.

Second. What amount it will be necessary for the executors aforesaid to pay into the court out of the proceeds of said sale to satisfy said claims.

The Commissioner took proof under this order of reference
400 at the office of Brown & Spurlock in the city of Chattanooga on Thursday, the 25th day of August, 1904, in the presence of Robert Pritchard and George D. Lancaster, attorneys for H. F. Rogers, trustee, and of Frank Spurlock, attorney for the defendant; and upon the proof taken and the stipulation of counsel to the effect that the Commissioner "may look to the record, proceedings and proof in the bankruptcy case of I. B. Merriam for the purpose of ascertaining the debts, and that the lists of debts when so made out from the record, proceedings and proof aforesaid shall be treated as established by the evidence for the purpose of this reference," would respectfully report as follows:

The Commissioner has examined the records in the bankruptcy case of I. B. Merriam in the office of the referee, and of the clerk of the United States District Court, from which it appears that up to the date of the filing of this report, the claims of creditors, duly proven in manner and form prescribed by law, against the said bankrupt, I. B. Merriam, amount to the total sum of $45,443.23, as will more fully appear by a detailed list thereof herewith filed and marked Exhibit "A" to this report.

As before stated, all of said claims are regular in form and duly proven as required by the bankrupt act and in accordance with the provisions of Section 57D of the bankruptcy act, have been provisionally allowed, subject, however, to the provisions of 57K. authorizing a reconsideration for cause and their re-allowance or rejection as the case may be.

Counsel for the defendants have taken the deposition of I. B. Merriam upon this reference, the purport of which is to show the fact that a number of payments were made by him to certain creditors within the four months next preceding the filing of the petition in bankruptcy, and a list of such payments and of the respective amounts paid the particular creditors receiving the same is herewith filed marked Exhibit "B" to this report.

This deposition is taken by counsel for the defendants with the evident purpose and intent of establishing the fact that there are other creditors of the bankrupt other than the defendant sued in this cause who are in like situation as the defendant with respect to the right of the trustee to proceed against them for the recovery of preference paid them as was done in this case, and that it is the duty of the trustee to take appropriate action in that regard upon the necessary facts being made to appear; and that if such
401 steps were taken by the trustee and such other preferred creditors made to disgorge their unlawful preference, the final decree against the defendant in this cause would be abated to that extent.

The trustee, by his counsel, however, objected to the deposition aforesaid upon the ground that the creditors whose claims are referred to as receiving preferences are not, as the trustee is advised, represented by the trustee so far as the question of establishing their claims is involved, but that in the case of contest the attitude of the trustee is antagonistic to creditors; and, moreover, that the claims

of said creditors have already been proved and allowed against the estate, and that this proceedings is ancillary to the bankrupt proceeding and the creditors are not parties thereto, so far as any dispute concerning their claims or any question of their liability to refund the payments received by them may be made, and if they are, these are matters concerning which they must represent themselves.

The Commissioner is of the opinion that any objection to any claim duly filed and proved in the bankruptcy case can only be made in such proceeding by a direct issue raised by the trustee against the particular creditor whose claim is sought to be inquired into, upon a rule to show cause or other appropriate method that will give the creditor due notice and will bring him before the court.

Because of this fact therefore, and the further fact that the record as now before me does not disclose whether or not there have been preferential payments within the four months as sought to be shown by defendant's counsel, I cannot report upon such questions in this collateral proceeding.

The Commissioner therefore reports upon both the items of the order of reference that the total sum necessary to pay in court out of the proceeds of said sale to satisfy the claims of creditors of said I. B. Merriam is the sum of $45,443.23, such sum being the face value of the amount of claims of creditors duly filed and proven in the bankruptcy case of I. B. Merriam at this date.

Respectfully submitted,

D. L. GRAYSON,
Commissioner.

. . . .

EXHIBIT "A."

List of Unsecured Debts of I. B. Merriam, July 21, 1904.

Gus Cate	$2,216	11
D. M. Coffman	500	00
J. F. Loomis	450	00
402 T. C. Ryall	43	10
Blue Grass Canning Co.	116	16
Mrs. S. O. Venn	2,697	52
Levy and Goldsmith	63	75
Mutual Rice Mill, Limited	50	78
Jacob Dodd & Co.	18	00
Nordlinger Charlton Fireworks Co	34	30
O. W. Thrum Co.	12	61
W. H. Dudley & Co	89	00
R. E. Whitaker	17	95
Ohio Match Co.	126	44
C. F. Ware Coffee Co.	116	25
The Williams Bros. Co.	211	44
H. D. Huffaker	287	85
J. H. Allison & Co.	20	57
M. Block & Co.	70	79
D. C. Wheeler & Co.	57	95

Indiana Match Co.	110 48
C. F. Sauer Co.	30 23
St. John Cigar Co.	142 80
Willard Tobacco Works	52 00
First National Bank	2,756 45
Tennessee Pure Food Co.	24 30
American Chicle Co.	102 00
American Syrup and Preserving Co.	825 04
Brooks Oil Company	162 55
	$11,406 42
	$11,406 42
F. M. Reeves	1,190 48
National Enameling & Stamping Co.	67 02
Kingman & Co.	30 00
B. Frank & Sons	139 97
T. H. Cheek	44 00
W. T. Hope	10 00
Thos. N. Merriam	987 42
Isaac Merriam	247 42
Thos. N. Merriam	293 85
F. A. Hood	20 77
Georgia Soap Co.	30 15
A. D. Storey, Guardian	9,000 00
A. D. Storey	250 00
F. F. Wiehl	2,513 89
J. Weller Co.	254 72
Carthage Tobacco Co.	421 07
Brady Robinson Co.	28 10
403 N. Dietzen & Bro.	1,236 57
N. R. Haymore	80 78
B. E. Tatum	275 76
Pritchard & Sizer	500 00
Lever Bros., Limited	150 00
National Biscuit Co.	62 06
Phil Lye Chemical Co.	36 25
A. J. Aull	27 69
Phillips Snuff Gum Co.	15 30
Graham Bros. Co.	21 34
J. L. Brown Banking Co.	5,737 98
M. S. Block Son & Co.	26 20
Price & Lucas Cider & Vinegar Co.	24 20
R. M. Hughes & Co.	241 22
First National Bank	6,250 00
Force Food Co.	40 50
Atlantic Peanut Co.	33 75
Jas. Pyle & Sons	35 58
Great Western Cereal Co.	84 00
Leopold Miller & Sons	83 56
Chatfield & Woods Co.	26 47

Hamilton Trust & Savings Bank		81 40
Scholze Bros. & Co.		449 70
Enterprise Soap Works		82 51
T. A. Snow Co.		37 90
Steinwender Stoffregen Coffee Co.		289 76
Wm. Demuth Co.		49 50
National Paper Co.		62 67
Crystal Oil Co.		21 25
Frank W. Winne & Son		53 49
Fritts & Wiehl		133 33
Davidson Clothing Co.		27 00
Sam Johnson		81 66
Glover & Grady		65 25
J. R. Baylor		32 65
National Starch Co.		68 75
G. Penn Sons Tobacco Co.		155 06
Penn & Watson		183 71
Ault Wooden Ware Co.		126 30
Chatta. Broom Works		10 80
Illinois Canning Co.		33 50
W. G. Deab & Son		78 54
Greenville Tobacco Mfg. Co.		121 59
		$44,170 81
Kellogg & Shedden		117 75
404 Woolen Spice Co.		35 00
Maryland Biscuit Co.		81 17
Phœnix American Pipe Works		38 50
Gus Cate		1,000 00
		$45,443 23

EXHIBIT "B."

J. F. Loomis, payment on note		$150 00
Blue Grass Canning Co., April 30, 1903		20 00
Mrs. S. O. Vann		402 04
Feb. 23d	$38 01	
Mar. 20th	38 01	
Apl. 23d	38 01	
May 25th	38 01	
Jun. 6th	250 00	
The Williams Bros. Co.		73 02
First National Bank		14,673 98
Mch. 16th	10 00	
Mch. 26th	20 00	
Apl. 6th	50 00	
Apl. 12th	10 00	
May 14th	200 00	
Jun. 2d	3,298 47	

	Jun. 2d	4,000 00	
	Jun. 2d	3,500 00	
	Jun. 2d	2,500 00	
	Jun. 3d	500 00	
	Jun. 3d	500 00	
	Jun. 8th	30 00	
	Jun. 8th	20 00	
	Jun. 8th	35 51	
		$14,673 98	
American Syrup & Preserving Co.			285 28
	Feb. 18th	$71 47	
	Mch. 24th	41 85	
	Apr. 3d	42 00	
	Apr. 5th	105 81	
	Apr. 6th	77 84	
	Apr. 12th	77 84	
	May 18th	78 40	
	May 27th	59 78	
Brooks Oil Co.			100 00
National Enameling & Stamping Co., Mch. 28th			50 00
Thomas Merriam			345 57
Isaac B. Merriam, Jr.			172 26
	Graham Brothers, Feb. 26th		25 00
405	Great Western Cereal Co., May 28th		59 00
	Fritts & Wiehl, June 24		61 67
Greenville Tobacco Co., Mch. 25th			62 70
Glover & Grady, June 2d			10 00
Penn & Watson			50 00

(Here follows "Decree Confirming Report of Special Master, etc.) Filed 22d of September, 1904.

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

No. 517.

H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM ET AL.

In re I. B. MERRIAM, Bankrupt.

This cause came on to be further heard on the report of the special master, D. L. Grayson, to whom it was heretofore referred, and his report being unexcepted to is in all things confirmed.

And it appearing from said report that the total amount of claims filed against the estate of I. B. Merriam, bankrupt, and which have been proven and allowed without exception heretofore made, is forty-five thousand, four hundred and forty-three and 23-100 dol-

lars ($45,443.23), it is therefore ordered, adjudged and decreed that the plaintiff, H. F. Rogers, as trustee of the estate of I. B. Merriam, recover of E. J. Page and Robert Markert, executors of the estate of Thomas Merriam, deceased, the said sum of forty-five thousand, four hundred and forty-three and 23-100 dollars and the costs of this cause, for which execution may issue.

The net funds collected under this decree, after the payment of costs and such fees and expenses incident to this case as may be allowed by the court, shall be paid into the bankruptcy case, to be administered according to orders hereafter to be made therein.

Enter this.

CLARK, *Judge.*

O. K.
PRITCHARD & SIZER.
WILLIAMS & LANCASTER.
BROWN & SPURLOCK.

Mandate.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit, ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Eastern District of Tennessee, Greeting:

406 Whereas, lately in the District Court of the United States for the Eastern District of Tennessee, before you or some of you, in a cause between H. F. Rogers, trustee of the estate of I. B. Merriam, bankrupt, petitioner and Thomas Merriam, *et al.*, defendants, wherein a decree was rendered in favor of said defendants and against said petitioner as by the inspection of the transcript of the record of the said district court which was brought into the United States Circuit Court of Appeals for the Sixth Circuit by virtue of an appeal agreeably to the act of congress, in such cases made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and four, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel.

On consideration Whereof:

It is now here ordered, adjudged and decreed by this court, that the decree of the said district court, in this cause be and the same is hereby so modified as to direct the ascertainment of the money necessary for the purposes indicated, whereupon to enter a decree against the executors of Thos. Merriam for the sum thus settled, not however, to exceed the amount applied by Thos. Merriam in payment of his own claims and that which, by his insistence, was applied in his exoneration as surety or endorser.

The costs of this appeal will be paid by the executors of Thos. Merriam.

You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the seventh day of December, in the year of our Lord one thousand nine hundred and five.

Costs. Appellant.

Clerk	$29.80
Printing record	304.10
Attorney	20
	$353.90

[SEAL.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

(Endorsed:) Filed Dec. 8, '05. R. M. Watkins, Deputy Clerk.

407 Be it remembered, That at a District Court of the United States, begun and held for the Southern Division of the Eastern District of Tennessee, at the court rooms in the city of Chattanooga, Tennessee, within said district and the Sixth Circuit, on the first Monday, it being the 2nd day of October, A. D., 1905. Present and presiding the Honorable C. D. Clark, District Judge.

Among the proceedings had were the following, to-wit:

THURSDAY, *December 28th*, 1905.

Court met pursuant to adjournment.

Present and presiding at Chambers the Honorable C. D. Clark, judge of the United States District Court for the Eastern and Middle Districts of Tennessee.

Decree of Mandate.

In re I. B. MERRIAM, Bankrupt.

No. —.

H. F. ROGERS, Trustee of I. B. Merriam, Bankrupt,
vs.
E. J. PAGE ET AL., Executors of Thomas Merriam, Deceased.

The mandate from the United States Circuit Court of Appeals for the Sixth Circuit, together with copy of the opinion and decree of the court in this case having been received and filed, it is now ordered and decreed by the court that the decree heretofore entered

in this case be and the same is hereby modified in accordance with said opinion and mandate, that is to say, that the complainant, H. F. Rogers, trustee of I. B. Merriam, bankrupt, is entitled to have and recover of the defendants, E. J. Page and Robert Markert, executors of the estate of Thomas Merriam, deceased, such sum as may be necessary for the payment of all debts of every class which have been or may be proved against the bankrupt and the expenses of the trustee, his fees, and the costs of the bankrupt cause, but only to the extent of such payments.

And because it does not appear what amount will be necessary for the purposes indicated, the court is pleased to appoint Joe V. Williams special master to take and state an account and report to the court as soon as practicable:

1. A list of the claims of every character which have been or may be proved against the bankrupt, their nature, amounts and the aggregate.
2. The amount of the expenses and fees of the trustee.
3. The costs in the bankrupt cause.
4. The amount of the reasonable compensation of Williams & Lancaster and Pritchard & Sizer, as attorneys for the trustee, including their services in this case.

408 The special master will give reasonable notice to the attorneys for the trustee and the attorneys for the executors of Thomas Merriam, deceased, of the time and place of taking the account.

To which decree defendants except.

Enter this.

CLARK, *J.*

Deposition of D. L. Grayson.

In the District Court of the United States for the Eastern District of Tennessee.

H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM.

Reference before J. V. Williams, Special Master.

Deposition of D. L. Grayson, Taken on the 12th Day of February, 1906, by Agreement, in Presence of Attorneys for Both Sides.

Formalities waived.

Said witness, being duly sworn, deposed as follows:

1. Where do you live?
A. Chattanooga, Tenn.
2. What official position do you hold?
A. I am referee in bankruptcy for the Southern Division of the Eastern District of Tennessee.

3. How long have you held that position?

A. About eight years.

4. State whether or not, as such referee, there is pending before you the bankruptcy case styled *In Re*, I. B. Merriam, Bankrupt.

A. There is such a case now pending.

5. State whether or not you are the D. L. Grayson to whom, as special commissioner, the court in this cause has heretofore made a reference to ascertain and report what debts have been filed against the estate of said bankrupt which have been allowed or are allowable against said estate, and what amount it would be necessary to pay into court to satisfy those claims.

A. I made a report as special commissioner along the lines alluded to.

6. Is that the report filed in this cause in September, 1904?

A. I think that is the report.

7. According to that report these claims amounted to $45,443.23, did they not?

A. I think that is the amount.

8. I will ask you to look at page 345 of the printed record in this cause, and state whether that amount is not the exact sum reported by you and allowed by the Court.

409 A. That is the amount as shown in this record, $45,443.23, which I presume is a correct copy of the decree based on the report. The original paper, of which the transcript is supposed to be a copy, is on file in this case and I prefer to refer to that.

9. Have any other claims been filed or allowed by you as Referee in this bankruptcy case since the filing by you of the report above described?

A. I think not, inasmuch as the report in question was not made up until after the expiration of the year in which the claims could be filed.

10. Will you please examine the record in that cause and state whether or not any other claims have been filed?

A. I will do so. I am morally certain that none have been filed since. I find after examination that my report was filed Aug. 30, 1904, and no claims have been filed since.

11. Please state if the sum of $45,443.23 and interest is paid to the unsecured creditors in this cause, what additional sum would have to be paid into Court in order to defray the expense of compensation to the trustee and compensation to the referee.

A. The trustee is entitled to a graded commission on all sums disbursed by him for any purpose, which aggregate the sum of $240 on the first $10,000, and thereafter the sum of one per cent. on all sums above the first $10,000 disbursed. The Referee is entitled to a commission of one per cent. straight on all sums disbursed to creditors by the trustee.

12. So that if we ascertain the total amount disbursed by the Trustee for all purposes it is a mere matter of calculation as to what his compensation should be?

A. The compensation is fixed by statute.

13. And the compensation of the Referee is one per cent. straight upon the actual amount paid to creditors?
A. Yes.

Cross-examination:

1. Was the statement referred to by you made from proof of claims filed with you showing the nature and the amount of each debt in each case?
A. It was.
2. Will you file as Exhibits 1, and following with consecutive numbers, copy of the proof of claims in regard to each item included in that report?
A. This list of claims was made from the claims now on file with me.

Deponent further saith not.

D. L. GRAYSON.

410 It is agreed by attorneys that the original proofs of claim may be referred to as exhibits to this question subject to all exceptions which might be taken to copies of these records; this being done to save expense of making copies of these proofs of claims. Counsel for the complainant in this case do not, by making this agreement, waive any objection to the admissibility of either originals or copies under this reference, but expressly except thereto because they are beyond the scope of this reference. Oath waived and filed February 12, 1906.

JOE V. WILLIAMS,
Special Master.

(Endorsed:) Filed Feb. 26, 1906. Horace Van Deventer, Clerk.

Deposition of Geo. D. Lancaster.

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

H. F. ROGERS, Trustee, etc.,
vs.
THOMAS MERRIAM ET AL.

Deposition of George D. Lancaster, Taken on Behalf of Pritchard & Sizer and Williams & Lancaster, in the Reference Made in This Cause to Joe V. Williams as Special Master.

Said witness being first duly sworn deposed as follows:
Q. 1. Please state what connection, if any, you had with the above styled cause; what services were rendered therein by the law firm of Pritchard & Sizer and Williams & Lancaster, and what in your opinion should be the reasonable compensation for such services under the circumstances.

A. In June, 1903, I. B. Merriam of this city filed his voluntary petition in bankruptcy in this Court, as the record in this cause shows, the real estate conveyed by the bankrupt was incumbered by mortgages, the liens thereon being in excess of the then present cash value of the property. In addition to these liens there were other and unsecured claims against his estate approximating between $45,000 and $50,000, and to pay these claims the bankrupt conveyed personalty in value somewhere in the neighborhood of $2,000. It was manifest that after the payment of the expenses of the bankruptcy court there would not be enough left to pay the creditors more than a few cents on the dollar. It was known that a few days prior to the bankruptcy of I. B. Merriam he had transferred to his brother, the defendant in this cause, certain coal lands in
411 Cumberland County of this State for a large sum and none of the proceeds of this sale were scheduled by the bankrupt. The bankrupt was examined at the meeting of the creditors and facts were brought out which induced us to believe there was reasonable cause to believe that the conveyance above mentioned of the coal lands to Thomas Merriam was not only an unlawful performance but was fraudulent in fact and in law and could be set aside. On the same day the trustee, Mr. H. F. Rogers, was elected and thereupon he retained the firms of Pritchard & Sizer and Williams & Lancaster as his attorneys. Witness is a member of the firm of Williams & Lancaster. The attorneys in question were compelled to take immediate action and this they did by filing the bill in this cause. The litigation resulting was one of more than usual difficulty and the effort on our part to sustain our bill was most strenuously and ably resisted by counsel for defendant.

Every proposition of fact and law made by us in our bill was denied by defendant. Of course the Trustee of his own knowledge knew nothing of the merits of the case nor the transaction between the defendant and the bankrupt; hence it happened that the attorneys for the Trustee were compelled to be in fact the principals as well as the attorneys in the case and therefore had not only to prepare and try the lawsuit but to make all investigations and to get at all the facts upon which the lawsuit was based. In this we met with great difficulty. In the first *please*, the bankrupt both because of the position in which he was placed by virtue of the charges in our bill and because of the fact that he was a brother of the defendant was not only of no help to us but was antagonistic. We could have no conferences with him nor could we get from him any information except that which was obtained on the witness stand. We could find no one who actually knew of the transactions between defendant and the bankrupt and thus for a while it seemed that we were helpless to overcome the denials made by defendant in his answer. In this situation we were compelled to go into the "camp of the enemy" to make out our case. We put the bankrupt himself upon the witness stand as our witness and did the best we could with him considering his antagonistic attitude. After his examination we went to Syracuse, New York, and spent several days there in the examination of the defendant and his partner Mr. Robinson

and several members of defendant's family. We then returned to Chattanooga and for some days investigated the matter
412 here, as a result of which we introduced the witnesses shown in the record. In this manner and under these difficulties we made out our case.

The suit was argued at length before Judge Clark, the District Judge, and after the arguments we devoted much time and labor in presenting additional briefs on the questions involved.

As the record shows, Judge Clarke held that the Trustee was entitled to recover in a sum equal to the amount of the unsecured claims. It seems, however, that the amount received by defendant as a result of the sale of the Cumberland County coal lands was in excess of the amount of the unsecured claims. Judge Clark held, however, that the Trustee was not entitled to have any of this excess paid into Court to the end that the expense of the bankruptcy proceedings might be paid therefrom as well as the principal of the unsecured claims. Defendant appealed from so much of the decision of Judge Clark as held that the Trustee was entitled to recover to the extent of the unsecured claims and the Trustee appealed from so much of the decision as held that the excess above mentioned should not be applied to the payment of the expenses of the bankruptcy proceedings. In this condition the case was presented to the Circuit Court of Appeals at Cincinnati. That Court rendered the opinion which is of record in this cause sustaining our view of the lawsuit.

The active work on behalf of the Trustee in this case was done by Mr. Pritchard and Mr. Lancaster. Both gave much of their time to the case. In the conferences that were had in reference to it both Mr. Sizer and Mr. Williams participated. As the record shows, our efforts have been to this point successful and if the amount of this decree is collected the expenses of the bankruptcy proceedings will be paid and the creditors of the bankrupt will receive their claims in full. Without this success in this litigation the creditors of the bankrupt will receive practically nothing.

I do not feel that it is becoming in us to say more than I have said in reference to this matter but will content myself by referring to the record as the best evidence of whether we have done our part faithfully and efficiently. The best evidence of this fact we have is that we succeeded nothwithstanding the very earnest and diligent efforts of the very able counsel who in this case represented the defendant.

There are two elements which should be considered in my judgment in reaching the extent of compensation that should be
413 paid to the attorneys of the Trustee. The first element is the extent and the character of work done by them, the amount involved in the case and the results obtained. The next is that had this suit not been successful the attorneys for the Trustee would have received practically nothing for their work. In other words, the practical situation was that the attorneys for the *attorneys for the* bankrupt were working upon the basis of a contingent fee.

Taking all these things into consideration I feel that their compensation should be from 20 per cent. to 25 per cent. of the recovery.

I do not think this amount excessive but on the contrary I think it very reasonable. As a matter of fact I think it is well recognized that where contingent fees are charged at this bar the average percentage is 33 1/3 per cent. of the recovery.

Cros examination:

Q. State whether or not substantially all the facts upon which were based the merits of this present suit were not developed in the examination of I. B. Merriam, the bankrupt, at the creditors' meeting, which examination preceded this particular suit.

A. It is true that the examination of the bankrupt did develop some of the material facts upon which we rested our right to recover in this suit but that examination did not develop all of such facts. The bankrupt was manifestly antagonistic to us and did what he could to justify his brother the defendant in this cause and it became necessary for us to make independent investigation. However, this is a matter of opinion and the record itself is the best evidence of what the examination of the bankrupt developed.

GEO. D. LANCASTER.

Oath waived and filed January 11, 1906.

JOE V. WILLIAMS,
Special Master.

(Endorsed:) Filed Feb. 26th, 1906. Horace Van Deventer, Clerk.

H. F. ROGERS, Trustee,
vs.
THOMAS MERRIAM ET AL.

Deposition of W. G. M. Thomas, Taken upon the Question of Fees to the Attorneys for the Trustee.

Said witness, being duly sworn, deposed as follows:

1. Q. Are you an attorney at law?

A. Yes, sir; I am.

414 2. Q. How long have you been such attorney and where have you practiced?

A. I have been a practicing attorney in Chattanooga since 1883, and have practiced in the state and federal courts and in the appellate state and federal courts.

3. Q. Are you at all familiar with this case and have you examined the file of papers, together with the proof taken on this reference?

A. Yes, sir; I was more or less acquainted with the record and proceedings in the I. B. Merriam bankruptcy case while it was proceeding through court. I had no connection with the case, but I knew of the claim made against Thomas Merriam and was more or less familiar with the controversy and the questions in dispute. Messrs. Pritchard and Lancaster asked me a few days ago to examine the record with the view of acquainting myself with it, so

as to be able to give a deposition on the subject of reasonable attorney's fees to the firms of Pritchard & Sizer and Williams & Lancaster for their services. To this end, I have examined the original record, which is a large one. I have also examined the printed record, and the printed briefs on both sides, and also many of the typewritten briefs used before his honor, Judge Clark; and I think I am now fairly well acquainted with the proceedings, the work done by the lawyers and the result accomplished.

4. Q. Please say what, in your opinion, would be fair and reasonable compensation to be allowed to Pritchard & Sizer and Williams & Lancaster for their services in this case.

A. I find that the bankrupt had only some $2,000 of assets, outside of this preference to Thos. Merriam. The claims of the creditors amounted to somewhere from $45,000 to $55,000, principal and interest. The services of the trustee's attorneys result now in the creditors getting payment in full with interest and a sufficient fund is left to pay all costs and attorneys' fees, in addition. But for this suit, the creditors would have had nothing, or practically nothing.

I find that the case is one which was made, in all substantial ways, by the lawyers themselves. Their client, the trustee, did not know the facts, and the bankrupt was a brother of the defendant and was not disposed in favor of the creditors against his brother. The case was sharply contested; the record is a large one; a great amount of service became necessary in the preparation of the briefs and the taking of proof in Chattanooga and in
415 the Eastern States. In my opinion, the lawyers' compensation deserves to be measured very much like compensation to be measured in cases of damages where the fees are contingent. And, without going farther into the facts and details, it is my opinion that these two firms of lawyers have earned a very substantial fee and ought to be well paid. I think a fee equal to 25 per cent. of the sum which will be paid over to the creditors would be a reasonable and fair fee to all these lawyers. In fact, if the court, creditors and trustee had asked for a fee contract with these attorneys before this suit was brought, I doubt whether such a contract would have been as low as 25 per cent. I feel sure that the creditors and the trustee would have been most willing to have made a contract with these lawyers, contingent upon the result, to pay them 25 per cent. of the sum realized by the creditors.

W. G. M. THOMAS.

Oath waived and filed January 11, 1907.

JOE V. WILLIAMS,
Special Master.

(Endorsed:) Filed Feb. 26, 1906. Horace Van Deventer, Clerk.

Deposition of Robert Pritchard.

In the District Court of the United States for the Eastern District of Tennessee.

H. F. ROGERS, Trustee of the Estate of I. B. Merriam,
vs.
E. J. PAGE and ROBERT MARKERT, Ex'rs.

Deposition of Robert Pritchard, Taken by Agreement Before J. V. Williams, Special Master, on the 11th Day of January, 1906, and Subsequent Days, under the Reference in the Above-entitled Case.

Said witness, ROBERT PRITCHARD, being first duly sworn, deposed as follows:

The firm- of Williams & Lancaster and Pritchard & Sizer (of which latter firm I am a member) have represented H. F. Rogers, trustee of the estate of I. B. Merriam, in this litigation from its beginning to the present time.

In June, 1903, I. B. Merriam filed his petition in bankruptcy and in the schedules of assets attached to the petition were set out the assets of the estate consisting of a stock of merchandise valued at about $1,100, accounts and bills receivable to the amount of some $1,000 or $1,500 and real estate which was valued at about $40,000. The liabilities set out in the schedule of debts amounted to about $75,000, of which about $38,000 was secured by encum-
416 brances on the real estate mentioned. The figures given are approximate only. It appeared from the examination of the bankrupt that there would be nothing for creditors. But it appeared in the course of the bankrupt's examination that a few days before he had filed his petition in bankruptcy he had conveyed to his brother Thomas Merriam of Syracuse, N. Y., an undivided half interest in a large tract of land in Cumberland County, Tennessee, and that the title had been passed to a corporation organized under the auspices of Thomas Merriam. Unless this transaction could be set aside the creditors could get nothing. Mr. Lancaster and myself attended the examination of the bankrupt and cross-examined him with a view to ascertain what the facts were connected with this land transaction. I. B. Merriam testified that the transaction was free from fraud, and endeavors by his testimony to support it. We made as full examination as possible, but the real facts were covered up so that it was difficult to get at them. We filed a bill in this case, knowing that if we were unsuccessful we would get little or no compensation. Our compensation was, in other words, purely contingent upon our success. Much proof was taken. Mr. Lancaster and myself went to Syracuse, N. Y., where Thomas Merriam, W. Herbert Robinson, Mrs. Anna Ernhout and Miss Merriam Ernhout were examined as witnesses for the defendant Thomas Merriam. We cross-examined these witnesses and I think that the result of the cross-examination tended strongly to establish our case. The printed transcript of the record will show substantially what was done in

this litigation, but of course much is omitted therefrom under stipulation between counsel. The defendant Thomas Merriam was represented in the litigation by Messrs. Brown & Spurlock and Messrs. Chambliss & Chambliss and by a firm of lawyers in Syracuse, N. Y. Every inch of the ground was fought over. The case was tried before Judge Clark and on July 15, 1904, decided by him in favor of the complainant. On the trial before Judge Clark the record was read and extensive oral arguments heard. Both sides also submitted elaborate briefs. Pending the hearing Thomas Merriam died and the case was revived against his executors Page and Markert. It should be stated that previously an agreement had been entered into releasing the land in Cumberland County and substituting therefor the personal liability of Thomas Merriam and his estate. An appeal was prosecuted by the executors from the decree of Judge Clark to the United States Circuit Court of Appeals at Cincinnati. Mr. Lancaster and myself went there and prepared
417 a brief, a copy of which is filed with this deposition as Exhibit "A." We also argued the case orally. The hearing resulted in a decree affirming and modifying Judge Clark's decree herein. The defendants had prayed a broad appeal. The complainant had appealed from so much of Judge Clark's decree as disallowed the costs, fees and expenses as a charge against the estate of Thomas Merriam. The Circuit Court of Appeals granted the relief sought by the appeal of the complainant.

As already intimated, the litigation has been active and vigorous and has involved many intricate questions requiring not only a great deal of outside work in the preparation of the case so as to get at the true facts, but a great deal of legal investigation. The counsel on the other side were active, vigilant and able, making every question that could be made in the litigation and requiring, as stated, much diligence on the part of the counsel for the complainant. The debts involved aggregated, I should say, something like $60,000. The creditors, as stated, would have got nothing but for what we have done in this case. So far as the creditors are concerned, the recovery is like finding so much money in the road. They have rendered no assistance and have been called on to pay no expenses. The lawyers have accomplished what has been accomplished. They found an estate without a dollar of assets in sight, and if the decree in this case can be collected the creditors will get one hundred cents on the dollar. We took this case knowing that our compensation would depend upon our success. It has been much more laborious and just as uncertain as any suit for personal injuries could be. I think 25 per cent. of the recovery would be a very reasonable compensation to the firms of Williams & Lancaster and Pritchard & Sizer for the services rendered in this litigation.

ROBERT PRITCHARD.

Oath waived and filed January 11, 1906.

JOE V. WILLIAMS,
Special Master.

(Endorsed:) Filed Feb. 26th, 1906. Horace Van Deventer, Clerk.

Report of Special Master.

In the U. S. District Court for the Southern Division of Eastern District of Tennessee.

418 No. 517.

In re I. B. MERRIAM, Bankrupt.

H. F. ROGERS, as Trustee of I. B. Merriam, Bankrupt,
vs.
E. J. PAGE ET AL., as Executors of Thomas Merriam, Deceased.

Report of Joe V. Williams as Special Master.

To the Hon. C. D. Clark, U. S. District Judge:

A decretal order was made and entered in this cause bearing date of December 28, 1905, by which it was referred to the undersigned as Special Master to take and state *on* account and report *of* the Court:

1. A list of the claims of every character which have been or may be proved against the bankrupt, their nature, amounts, and the aggregate.
2. The amount of the expenses and fees of the trustee.
3. The costs in the bankrupt cause.
4. The amount of the reasonable compensation of Williams & Lancaster *nad* Pritchard and Sizer, as attorneys for the Trustee, including their services in this case.

In pursuance thereof I gave due notice to the attorneys who represent the parties interested, and proceeded to take proof and investigate the matters so referred to me.

I do, therefore, respectfully report as follows:

1. As to the first item, I file herewith as a part of this report a statement marked Exhibit "A," which shows "a correct list of the claims *or* every character which have been, or may be, proved against the bankrupt, their nature, amounts and aggregate." I have carefully gone through each and every claim filed and allowed to obtain this information, and feel reasonably sure that I have correctly stated the facts appearing in this statement. It will be seen that the principal due on any given claim is first stated, and then the interest calculated as the law provides. If the claim consisted of an open account and interest was claimed in the proof of the same, I have allowed interest from the date of last item in the account; but in all other claims consisting of open accounts, I have calculated interest from date the petitioner was adjudged a bankrupt, namely, June 9, 1903, interest prior to adjudication on any open account was allowed only in one or two instances, and that was where interest was claimed in the proof of claim. Statute allows interest

on open account from average due date but if account was not itemized I gave interest simply from date of account in face.

The aggregate of the proved claims, including interest to January 15, 1906, is $60,394.94, interest on each and every claim being counted to this date.

419 Mr. Grayson, Referee, was examined as a witness before me and stated in his testimony that the proved claims amounted on August 30, 1904, to $45,443.23, and that since this date no other claims have been filed or allowed. He also calls attention to the report he made as Special Commissioner in this cause, and filed on that date, as to the total amount of the claims filed and allowed as being confirmatory of his statement. In my opinion the Referee is in error in this statement. I have compared the list of claims found in the file with the list contained in his report of Aug. 30, 1904, as found on pages 341 to 343 in the record which went to the Court of Appeals, and I am constrained to believe that he has inadvertently omitted three claims, namely, claim of A. W. Chambliss for $300 and two claims of First National Bank of Chattanooga, amounting respectively to $5,002.50 and $2,074.46 (net without interest) making a total of $7,376.96.

The first claim of these three was not filed within the statutory time, but was filed subject to all legal exceptions, and with the proviso that the right of claimant to share in the funds should be postponed to that of all other creditors, but there has been no objection on part of any one to this claim, and manifestly under decree of the Court there can be none now. The other two were filed within the time required by law, and the record does not disclose any reason why they should not be placed in the list of proved and allowed claims, and I report that both, as well as the claim of A. W. Chambliss, have been properly and regularly proved and allowed.

I was requested by the attorneys of the Executors to report the peculiar liability of the bankrupt on each item of indebtedness, that is whether individually liable, or liable as member of a partnership, and also in what way the proceeds arising from each claim went, that is whether into the bankrupt's business, which, it is claimed, was a partnership, or to him as an individual, etc. I have declined to comply with this request because of objection on part of attorneys for the Trustee, and further I was of opinion that such information was not responsive to the enquiry contained in the reference. If I am in error counsel can no doubt have the benefit of such proof, if competent, because it has been agreed that original proofs of claim may be referred to as exhibits, subject to all exceptions.

2. As to the second item, "The amount of the expenses and fees of the Trustee," I report that the total amount of compensation due the Trustee on January 15, 1906, is $756.27, and the total

420 amount of compensation due the Referee on same date is $603.94. The Trustee has filed with me a paper, herewith filed as Exhibit "B" and made a part of this report, which shows that he as Trustee has received $2,631.33 and has disbursed the sum of $1,232.90. As Trustee he is entitled to a commission of $240 on

first $10,000, and thereafter one per cent. on all sums above that amount, he disburses. The Referee is entitled to a commission of one per cent. disbursed to the creditors by the Trustee.

Exhibit "B" shows that the Trustee had the sum of $1,398.43 in his hands January 27, 1906.

3. As to the third item, "the costs in the bankrupt cause," I am unable to report upon; in fact, I am unable to approximate the amount.

Soon as I was appointed Special Master I wrote to the Clerk of the Court, Mr. Van Deventer, and notified him I desired a certificate of the cost in both branches of the litigation. The Clerk at once came to Chattanooga and we together examined his records but found no items of cost charged in the case by Mr. Ewing, who was Clerk at the time the items were charged; and Clerk Van Deventer then wrote to the Clerk of the Court of Appeals at Cincinnati to see if the amount of cost had been placed in the record certified on appeal, and to this inquiry our Clerk says he was notified that the cost had not been calculated and so certified. I attach herewith letter of the Clerk, dated Jan. 27, 1906, addressed to me, which gives this information, and mark the same Exhibit "C," and make it a part of this report.

4. As to the fourth and final item of the reference, namely; the reasonable compensation of Williams and Lancaster and Pritchard and Sizer, as attorneys for the Trustee for their services rendered in this cause, I report that, in my opinion, a reasonable compensation for both firms would be 25 per cent. of the total net amount, inclusive of interest, that will be paid to the creditors of the bankrupt. The aggregate of the claims being $60,394.94 on January 15, 1906, I am of opinion that one-fourth of this, or $15,098.73, is a reasonable compensation for their services; and further that their compensation should be one-fourth of whatever total net amount that may be paid to the creditors.

The depositions of Messrs. Robert Pritchard, George D. Lancaster and W. G. M. Thomas were taken before me upon this item, and are filed in the record.

The depositions are short and I deem it unnecessary to recite in detail what is shown in them.

The testimony, however, shows that the attorneys who represented the Trustee rendered a large amount of services in
421 the case; that they took hold of what was admittedly a complicated litigation with no assurance of any fixed compensation, but with the knowledge that success could only bring payment for their labor. The result of their services shows that the case was skillfully handled, and in view of the same, and the fact that 25 per cent. is the customary minimum fee for attorneys giving their services purely on the contingent plan, I feel reasonably sure that the conclusion I have reached is just and fair to all parties concerned.

Respectfully submitted,

JOE V. WILLIAMS,
Special Master.

EXHIBIT "A" TO REPORT OF JOE V. WILLIAMS AS SPECIAL MASTER.

Following are the proved claims, together with interest until January 15, 1906:

American Syrup and Preserving Co.,		
Principal	$825.04	
Interest	127.41	
Acc'd drafts for Mdse.		$952.45
Brooks Oil Co.,		
Principal	$162.55	
Interest	29.36	
Note for Mdse.		$191.95
F. M. Reeves,		
Principal	$1190.48	
Interest	284.76	
Notes for borr'd money		$1475.24
National Enameling & Stamping Co.,		
Principal	$67.02	
Interest	10.35	
Acc't Mdse.		$77.37
Kingan & Co., Limited,		
Principal	$30.00	
Interest	4.68	
Acc't Mdse.		$34.68
B. Frank & Sons,		
Principal	$139.97	
Interest	21.66	
Acc't Mdse.		$161.63
T. H. Cheek,		
Principal	$44.00	
Interest	6.86	
Acc't Mdse.		$50.86
W. T. Hope,		
Principal	$10.00	
Interest	1.55	
422 Acc't Physician's bill		$11.55

Thos. N. Merriam,		
Principal	$987.42	
Interest	154.08	
Acc't Salary Salesman		$1141.50
I. B. Merriam, Jr.,		
Principal	$247.42	
Interest	43.72	
Acc't Salary Salesman		$291.14
Thos. N. Merriam,		
Principal	$304.72	
Interest	46.44	
Two notes borr'd money		$351.16
F. A. Hood,		
Principal	$19.50	
Interest	4.28	
Note for Mdse		$23.78
Georgia Soap Co.,		
Principal	$30.15	
Interest	4.68	
Acc't	$12.60	
Bal. acc'd draft Mdse		$34.83
A. D. Story as Guardian,		
Principal	$9000	
Interest	1373	
Three notes		$10373.00
A. D. Story,		
Principal	$250.00	
Interest	38.29	
Note		$288.29
F. F. Wiehl Estate,		
Principal	$2156.00	
Interest	698.92	
Note for land		$2845.92
J. Weller Co.,		
Principal	$254.72	
Interest	39.73	
Acc't for Mdse		$294.45

Carthage Tobacco Works,		
Principal	$421.07	
Interest	65.68	
Acc't for Mdse.		$486.75
Brady, Robinson Co.,		
Principal	$28.10	
Interest	4.36	
Acc't for Mdse.		$32.46
First National Bank of Chattanooga,		
Principal.	$2,756.45	
423 Interest	460.84	
Notes borrowed money		$3,217.29
D. M. Coffman,		
Principal	$500.00	
Interest.	98.00	
Note paid as endorser		$598.00
J. F. Loomis,		
Principal	$450.00	
Interest.	68.77	
Note paid as endorser		$518.77
T. C. Ryall,		
Principal	$43.10	
Interest.	6.47	
Note for borrowed money		$49.57
Blue Grass Canning Co.,		
Principal	$116.16	
Interest	23.64	
Note for Mdse.		$139.80
Levy & Goldsmith,		
Principal	$63.75	
Interest.	9.94	
Acc't for Mdse.		$73.69
The Mutual Rice Mill, Limited,		
Principal	$52.13	
Interest.	10.03	
Acc't for Mdse.		$62.16

Jacob Dodd & Co.,		
Principal	$18.00	
Interest	3.33	
Acc't for Mdse		$21.33
Nordlinger-Charlton Fireworks Co.,		
Principal	$34.30	
Interest	6.20	
Acc't for Mdse		$40.50
O. W. Thum Co.,		
Principal	$12.61	
Interest	1.97	
Acc't for Mdse		$14.58
N. H. Dudley & Co.,		
Principal	$89.00	
Interest	13.88	
Acc't for Mdse		$102.88
R. E. Whitaker,		
Principal	$17.95	
Interest	2.80	
Acc't for blacksmithing		$20.75
Ohio Match Co.,		
Principal	$126.44	
424 Interest	19.72	
Acc't for Mdse		$146.16
The C. F. Ware Coffee Co.,		
Principal	$116.25	
Interest	18.14	
Acc't for Mdse		$134.39
The Williams Bros. Co.,		
Principal	$207.45	
Interest	33.19	
Note for Mdse		$240.64
H. D. Huffaker,		
Principal	$287.85	
Interest	50.91	
Note for Taxes		$338.76

J. H. Allison & Co.,		
Principal	$20.57	
Interest	3.21	
Acc't for Mdse		$23.78
M. Block & Co.,		
Principal	$70.79	
Interest	10.81	
Note for Mdse		$81.60
D. C. Wheeler & Co.,		
Principal	$57.95	
Interest	9.82	
Protested note for Mdse		$67.77
Indiana Match Co.,		
Principal	$110.48	
Interest	17.23	
Acc't for Mdse		$127.71
C. F. Sauer Co.,		
Principal	$30.23	
Interest	5.06	
Note for Mdse		$35.29
St. John Cigar Co.,		
Principal	$142.80	
Interest	23.18	
Note		$165.98
Willard Tobacco Works,		
Principal	$52.00	
Interest	8.11	
Acc't for Mdse		$60.11
R. M. Hughes & Co.,		
Principal	$241.22	
Interest	37.63	
Acc't for Mdse		$278.85
Price & Lucas Cider & Vinegar Co.,		
Principal	$24.20	
425 Interest	3.88	
Acc't for Mdse		$28.08

M. S. Block, Son & Co.,		
Principal	$26.20	
Interest	4.19	
Acc't for Mdse		$30.39
J. L. Brown Banking Co.,		
Principal	$4,962.60	
Interest	1,401.09	
Note for borrowed money		$6,363.69
Graham Bros. & Co.,		
Principal	$21.34	
Interest	3.33	
Acc't for Mdse		$24.67
Phillips Snuff Gum Co.,		
Principal	$15.30	
Interest	2.36	
Note for Mdse		$17.66
A. J. Aull,		
Principal	$27.69	
Interest	4.32	
Acc't for Mdse		$32.01
Philadelphia Lye & Chemical Co.,		
Principal	$36.25	
Interest	6.66	
Acc't for Mdse		$42.91
National Biscuit Co.,		
Principal	$62.09	
Interest	9.47	
Acc't for Mdse		$71.56
Lever Bros., Limited,		
Principal	$150.00	
Interest	23.40	
Acc't for Mdse		$173.40
Pritchard & Sizer,		
Principal	$500.00	
Interest	78.00	
Acc't for Att'y's fee		$578.00

B. E. Tatum,		
Principal	$275.76	
Interest	42.98	
Note for Att'y Fee		$318.74
N. R. Haymore,		
Principal	$76.23	
Interest	16.86	
Note for labor, Acc't in store		$93.09
Mrs. S. O. Vann,		
Principal	$2,691.07	
426 Interest	830.13	
Note for borrowed money		$3,621.20
N. Deitzen & Bro.,		
Principal	$1,236.57	
Interest	240.14	
Acc't $12.31; Bal. notes for Mdse		$1,476.71
Great Western Cereal Co.,		
Principal	$84.00	
Interest	13.10	
Acc't for Mdse		$97.10
American Chicle Co.,		
Principal	$102.00	
Interest	15.91	
Acc't for Mdse		$117.91
Genessee Pure Food Co.,		
Principal	$24.30	
Interest	3.79	
Acc't for Mdse		$28.09
First National Bank of Chattanooga,		
Principal	$6,250.00	
Interest	1,271.87	
Note for borrowed money		$7,521.87
Force Food Co.,		
Principal	$40.50	
Interest	6.32	
Acc't for Mdse		$46.82

Atlantic Peanut Co.,		
Principal	$33.75	
Interest	5.26	
Acc't for Mdse		$39.01
James Pyle & Sons,		
Principal	$35.58	
Interest	5.58	
Acc't for Mdse		$41.16
Leapold Miller & Sons,		
Principal	$83.56	
Interest	13.47	
Protested check for Mdse		$97.03
Chatfield & Woods Co.,		
Principal	$26.47	
Interest	4.13	
Acc't for Mdse		$30.60
Hamilton Trust & Savings Bank,		
Principal	$81.40	
Interest	12.77	
Note for borrowed money		$94.17
Scholze Bros. & Co.,		
Principal	$449.70	
427 Interest	70.16	
Acc't for Mdse		$519.86
Enterprise Soap Works,		
Principal	$72.04	
Interest	17.31	
Acc't 10.47; Bal. note for Mdse		$89.35
T. A. Snow Co.,		
Principal	$37.90	
Interest	5.91	
Acc't for Mdse		$43.81
Steinwender-Stoffregen Coffee Co.,		
Principal	$289.76	
Interest	45.16	
Acc't for Mdse		$334.92

Wm. Demuth & Co.,		
Principal	$49.50	
Interest	7.72	
Acc't for Mdse		$57.22
National Paper Co.,		
Principal	$62.67	
Interest	9.77	
Acc't for Mdse		$72.44
Crystal Oil Co.,		
Principal	$21.25	
Interest	3.31	
Acc't for Mdse		$24.56
Frank W. Winn & Son,		
Principal	$53.49	
Interest	8.33	
Acc't for Mdse		$61.82
Fritts & Wiehl,		
Principal	$133.34	
Interest	20.65	
Notes for Mdse		$153.99
Davidson Clothing Co.,		
Principal	$27.00	
Interest	4.21	
Acc't for Mdse		$31.21
Greenville Tobacco Mfg. Co.,		
Principal	$21.59	
Interest	3.37	
Acc't for Mdse		$24.96
Sam Johnson,		
Principal	$81.66	
Interest	12.74	
Acc't for Mdse		$94.40
Glover & Grady,		
Principal	$65.25	
428 Interest	10.17	
Acc't for Insurance		$75.42

J. R. Baylor,		
Principal	$32.65	
Interest	5.08	
Note for tuition for son		$37.73
National Starch Co.,		
Principal	$68.75	
Interest	10.72	
Acc't for Mdse		$79.47
Penn & Watson,		
Principal	$183.71	
Interest	28.64	
Notes for Mdse		$212.35
Ault Wooden Ware Co.,		
Principal	$126.30	
Interest	21.14	
Note		$147.44
Chattanooga Broom Works,		
Principal	$10.80	
Interest	1.68	
Acc't for Mdse		$12.48
Illinois Canning Co.,		
Principal	$33.50	
Interest	5.22	
Acc't for Mdse		$38.72
W. G. Dean & Son,		
Principal	$78.54	
Interest	12.25	
Acc't for Mdse		$90.79
Kellogg & Shedden,		
Principal	$117.75	
Interest	18.37	
Acc't for Mdse		$136.12
Woolson Spice Co.,		
Principal	$35.00	
Interest	12.26	
Note		$47.26

Maryland Biscuit Co.,		
Principal	$81.17	
Interest	12.66	
Acc't for Mdse.		$93.83
Phœnix American Pipe Works,		
Principal	$38.50	
Interest	6.00	
Acc't for Mdse.		$44.50
G. Penn Sons Tobacco Co.,		
Principal	$155.88	
429 Interest	34.29	
Note for Mdse		$190.17
Gus Cate,		
Principal	$1,685.10	
Interest	832.64	
Note for borrowed money		$2,517.74
A. W. Chambliss,		
Principal	$300.00	
Interest	46.10	
For money paid as endorser on note		$346.10
First National Bank of Chattanooga,		
Principal	$5,002.50	
Interest	788.00	
Note for borrowed money		$5,790.74
First National Bank of Chattanooga,		
Principal	$2,070.46	
Interest	389.87	
Discounted notes of various persons endorsed by bankrupt		$2,460.33
Total		$60,394.94

Statement of Receipts and Disbursements of H. F. Rogers, Receiver of I. B. Merriam, Bankrupt.

Accounts collected	$1,591.08
Rents collected	40.25
Merchandise sold	1,000.00
Total receipts	$2,631.33

Disbursements.

Sundry expenses paid	$682.90	
Paid Att'ys for expense, &c	550.00	
		1,232.90
Balance in bank		$1,398.43

January 27, 1906.

Exhibit B to report of Joe V. Williams, as special master.

Clerk's Office, United States District Court, Eastern District of Tennessee.

KNOXVILLE, TENN., *Jan. 27th,* 1906.

Joe V. Williams, Special Master, Chattanooga, Tenn.

MY DEAR MR. WILLIAMS: I wrote to Mr. Frank O. Loveland, clerk of the U. S. Circuit Court of Appeals, regarding the costs in the Rogers *vs.* Page and Markert case, and he answers as follows: "The transcript of record in the case of Rogers *vs.* Page and Markert does not contain a taxation of costs in your court. The
430 costs taxed in this court are attached to the mandate." Now as I stated to you while at Chattanooga, the rule docket in my court at Chattanooga, does not indicate that any costs were taxed for entering orders and items of that character, but that the filing fees in the bankruptcy case of I. D. Merriam case and some marshal's costs were paid in that case and Mr. Ewing was paid for making up the record in this case of Rogers *vs.* Page and Markert. I will be down about the 1st of February and go over the whole thing again with you if you wish to wait that long and see if we cannot straighten the thing out.

I remain,

Yours very truly, HORACE VAN DEVENTER, *Clerk.*

Exhibit C to report of Joe V. Williams, as special master.

(Endorsed:) Filed Feb. 26, 1906. Horace Van Deventer, clerk.

Exceptions to Report of Special Master.

In the United States District Court for the Southern Division of the Eastern District of Tennessee.

In re I. B. MERRIAM, Bankrupt.

No. 517.

H. F. ROGERS, as Trustee of I. B. Merriam, Bankrupt,
vs.
E. J. PAGE ET AL., as Executors of Thomas Merriam, Deceased.

Exceptions of the Defendant to Report of the Special Master Filed in Said Cause on 26th Day of February, 1906.

I.

The defendants except to the list of claims filed by the special master in response to Item 1 of said reference, and as shown by statement marked exhibit "A," because the master declined and refused to show the nature of claims included in said list in this: That there is not stated either the date of said claims or whether the same were liabilities of I. B. Merriam as an individual or of the firm doing business as Merriam & Son, composed of I. B. Merriam and Frank Merriam.

II.

The defendants except to said report in response to Item 1 of the reference, and to the statement filed as exhibit "A" thereto because said report and said exhibit fail to show that each of the following claims was for goods, wares and merchandise and
431 delivered by the claimant to the firm of Merriam & Son, or for services rendered to said firm:

American Syrup & Preserving Co., Principal..... $825.04
Accepted drafts dated in April, May and June, 1903, for "goods, wares and merchandise sold and delivered by the American Syrup & Preserving Co. to said Merriam & Sons."
See the original proof of this claim exhibit to D. L. Grayson's deposition.

Brooks Oil Co., Principal 162.55
Promissory note for "goods," wares and merchandise sold and delivered to said Merriam & Son at their special instance and request.
See original proof of this claim.

National Enameling & Stamping Co., Principal 67.02
Balance of account for "goods, wares and merchandise sold and delivered after crediting $25.00 paid March 31, 1903, and $25.00 paid June 2, 1903."
See original proof of this claim.

Kingdan & Co., Ltd., Principal..... $30.00
For "merchandise sold and delivered to Merriam & Son in which firm the said I. B. Merriam was a partner on its order."
See original proof of this claim.

B. Frank & Sons, Principal..... 139.97
"Goods, wares and merchandise sold and delivered to said Merriam & Son."
See original proof of this claim.

T. H. Cheek & Co., Principal..... 44.00
10 bags of rice sold to I. B. Merriam & Co., March 10, 1903.
See original proof of this claim.

J. Weller & Co., Principal..... 254.72
Merchandise sold to Merriam & Son.
See original proof of this claim.

Carthage Tobacco Works, Principal..... 421.07
Account for smoking tobacco sold to Merriam & Son November and December, 1903, and May, 1904.
See original proof of this claim.

Brady Robinson & Co., Principal..... 28.10
Account for merchandise sold to Merriam & Son, February 9, 1903.
See original proof of this claim.

Georgia Soap Co., Principal..... 30.15
432 Account for merchandise sold to Merriam & Son in February and April, 1903.
See original proof of this claim.

N. Deitzen & Bro., Principal..... 1,236.57
Notes and account for goods, wares and merchandise furnished Merriam & Son.
See original proof of this claim.

Blue Grass Canning Co., Principal..... 116.16
Merchandise sold to Merriam & Son.
See original proof of this claim.

Levy & Goldsmith, Principal..... 63.75
Goods and merchandise sold to Merriam & Son May 4, 1903.
See original proof of this claim.

M. Block & Co., Principal..... 70.79
Note dated May 28, 1903, for merchandise sold and delivered to Merriam & Son.
See original proof of this claim.

Lever Bros., Ltd., Principal..... 150.00
Account for merchandise sold to Merriam & Son, December 20, 1902, and March 23, 1903.
See original proof of this claim.

National Biscuit Co., Principal $6,206.00
Account merchandise sold Merriam & Sons in November, 1902.
See original proof of this claim.

Philadelphia Lye & Chemical Co., Principal 36.25
Account of merchandise sold and delivered Merriam & Son.
See original proof of this claim.

A. J. Aull, Principal..... 27.69
Account merchandise sold to Merriam & Son.
See original proof of this claim.

Phillips Snuff & Gum Co., Principal 15.30
Note dated May 20, 1903, for merchandise sold to Merriam & Son.
See original proof of this claim.

Graham Bros. & Co., Principal..... 21.34
Account merchandise sold and delivered to I. B. Merriam & Son.
See original proof of this claim.

Price & Lucus Cider & Vinegar Co., Principal 24.20
Account merchandise sold to Merriam & Son, March 24, 1903.
See original proof of this claim.

M. S. Block, Son & Co., Principal..... 26.20
433 Account merchandise sold to Merriam & Son, January 20, 1903.
See original proof of this claim.

Willard Tobacco Works, Principal..... 52.00
Account merchandise sold to Merriam & Son.
See original proof of this claim.

R. M. Hughes & Co., Principal..... 241.22
Account merchandise sold and delivered to Merriam & Son in March, April, May and June, 1903.
See original proof of this claim.

St. John Cigar Co., Principal..... ..... 142.80
Account note dated March 1, 1903, for merchandise sold Merriam & Son.
See original proof of this claim.

C. F. Sauer Co., Principal..... 30.00
Account note dated March 1, 1903, for merchandise sold Merriam & Son.
See original proof of this claim.

Indiana Match Co., Principal..... 110.48
Account merchandise sold to Merriam & Son January 26, 1903.
See original proof of this claim.

J. H. Allison & Co., Principal..... $20.57
Account merchandise sold Merriam & Son.
See original proof of this claim.

The Williams Bros. Co., Principal..... 211.44
Account merchandise sold Merriam & Son December 2, 1902.
See original proof of this claim.

C. F. Ware Coffee Co., Principal..... 116.25
Account merchandise sold Merriam & Son March 24, 1903.
See original proof of this claim.

Ohio Match Co., Principal..... 126.44
Account merchandise sold to Merriam & Son September 30, 1902.
See original proof of this claim.

W. H. Dudley & Co., Principal..... 89.00
Account merchandise sold to Merriam & Son March 3, 1903.
See original proof of this claim.

O. & W. Thum Co., Principal..... 12.61
Acc't merchandise sold to Merriam & Son.
See original proof of this claim.

Nordleinger-Charlton Fireworks Co., Principal..... 34.30
Account merchandise sold to Merriam & Son.
434 See original proof of this claim.

Jacob Dold Packing Co., Principal..... 18.00
Account merchandise sold to Merriam & Son December, 1902.
See original proof of this claim.

The Mutual Rice Mill, Ltd., Principal..... 50.78
Account merchandise sold to Merriam & Son May, 1902.
See original proof of this claim.

Penn & Watson, Principal..... 183.71
Account notes of Merriam & Son dated April 25, 1903.
See original proof of this claim.

Enterprise Soap Works, Principal..... 82.51
Balance on note and account merchandise sold to Merriam & Son.
See original proof of this claim.

T. A. Snow & Co., Principal..... 37.90
Merchandise sold to Merriam & Son in 1901 and 1902.
See original proof of this claim.

Steinwender-Stoffregen Coffee Co., Principal..... 289.76
Account merchandise sold to Merriam & Son April and May, 1903.
See original proof of this claim.

Wm. Demuth & Co., Principal..... $49.30
Account merchandise sold to Merriam & Son November 24, 1902.
See original proof of this claim.

National Paper Co., Principal..... 62.67
Account merchandise sold to Merriam & Son May 22, 1903.
See original proof of this claim.

Crystal Oil Co., Principal..... 25.21
Merchandise sold to Merriam & Son, May 6, 1902.
See original proof of this claim.

Frank W. Wynne & Son, Principal 53.49
Account merchandise sold to Merriam & Son January and February, 1903.
See original proof of this claim.

Fritts & Weihl, Principal..... 133.33
Notes dated May 21, 1903, merchandise sold to Merriam & Son.
See original proof of this claim.

Greenville Tobacco Mfg. Co., Principal..... 121.59
Account merchandise sold to Merriam & Son in April and May, 1903.
See original proof of this claim.

435 Ault Woodenware Co., Principal..... 126.30
Note dated February 14, 1903, merchandise sold Merriam & Son.
See original proof of this claim.

Illinois Canning Co., Principal..... 33.50
Account merchandise sold Merriam & Son January and February and March, 1902.
See original proof of this claim.

W. G. Dean & Son, Principal..... 78.54
Account merchandise sold Merriam & Son July, September and December, 1902, January and April, 1903.
See original proof of this claim.

Kellogg & Shedden, Principal..... 117.75
Merchandise sold Merriam & Son October 31, 1902.
See original proof of this claim.

Woolson Spice Co., Principal..... 35.00
Balance of note dated April 24, 1902, for merchandise sold Merriam & Son.
See original proof of this claim.

Merrymen Biscuit Co., Principal..... 81.17
Account Merchandise sold Merriam & Son in December, 1902.
See original proof of this claim.

Phœnix American Pipe Works, Principal..... $38.50
Merchandise sold Merriam & Son December 2, 1901.
See original proof of this claim.

Great Western Cereal Co., Principal..... 84.00
Merchandise sold Merriam & Son in January, March and April, 1903.
See original proof of this claim.

American Chicle Co., Principal..... 102.00
Merchandise sold Merriam & Son.
See original proof of this claim.

Genesee Pure Food Co., Principal..... 24.30
Merchandise sold Merriam & Co., March 27, 1903.
See original proof of this claim.

Force Food Co., Principal 40.50
Merchandise sold Merriam & Son April 13, 1903.
See original proof of this claim.

Atlantic Peanut Co., Principal 33.75
Balance of account merchandise sold Merriam & Son November 10, 1902.
See original proof of this claim.

James Pyle & Sons, Principal..... 35.58
436 Balance of account merchandise sold Merriam & Son October 31, 1902.
See original proof of this claim.

G. Penn Sons' Tobacco Co., Principal 155.06
Balance of notes of Merriam & Son dated July 7, 1902, for goods sold to them.
See original proof of this claim.

National Starch Co., Principal..... 68.75
Account merchandise sold to Merriam & Son March 18, 1902.
See original proof of this claim.

Leopold Miller & Sons, Principal 83.56
Account protested check of Merriam & Son dated May 5, 1903, for merchandise sold to them in November, 1902, and February, 1903, with protest fees added.
See original proof of this claim.

Chatfield & Woods Co., Principal..... 26.47
Account for merchandise sold to Merriam & Son in November, 1902.
See original proof of this claim.

Scholtz Bros. & Co., Principal 449.70
Merchandise sold to Merriam & Son in 1901 and 1902.
See original proof of this claim.

Thomas N. Merriam, Principal..... $987.42
Account for salary to June 9, 1903, as traveling salesman for Merriam & Son.
See original proof of this claim.

I. B. Merriam, Jr., Principal..... 247.42
Account for salary to June 9, 1903, as bookkeeper and salesman for Merriam & Son.
See original proof of this claim.

N. R. Haymore, Principal 80.78
Note dated May 8, 1902, for services as traveling salesman for Merriam & Son.
See original proof of this claim.

D. M. Coffman, Principal 500.00
Note dated July 9, 1902, money borrowed by Merriam & Son.
See original proof of this claim.

III.

The defendants except to the allowance of each of the foregoing claims as a charge against them under said order of reference; (1) because I. B. Merriam, the bankrupt, had a right under the Bankruptcy Act to pay out of his individual assets the claims he
437 owed individually to defendants' testator in preference to the claims against the firm of Merriam & Son; and (2) because the claims of defendants against I. B. Merriam are entitled to priority of payment out of his individual assets over the claims of the creditors of Merriam & Son under said Bankruptcy Act.

IV.

Defendants except to the allowance as claims to be paid by them of the following debts included in said report and exhibit "A:"

First National Bank, Principal..... $2,756.45
" " " " 6,250.00
" " " 5,002.50
" " " 2,070.46

because said claimant knew of the mortgage or deed of trust executed by I. B. Merriam, the bankrupt, to secure the testator of defendants, and accepted and held for its own benefit a note of $10,000.00 which was secured by the same deed. (See depositions of I. B. Merriam, printed transcript, page 95; T. G. Montague, same record, page 251.)

V.

Defendants except to the allowance as a claim to be paid by them of the debt of the J. L. Brown Banking Company, $4,962.00, as appears from said report and exhibit "A," because said claimant knew of the deed of trust executed by the bankrupt to the testator of defendants at the same time it was made, and knew of the settle-

ment made between said bankrupt and the testator of defendants, and did not, at the time said deed was executed, object to the same, and have not since set up any claim to avoid the priority of said mortgage. See deposition of Thomas Merriam printed transcript page 193; deposition I. B. Merriam transcript page 110.

VI.

Defendants except to the allowance as claims to be paid by them to the following debts:

Thomas M. Merriam, Principal..... $987.42
Thomas M. Merriam, Principal 304.72

because said claimant was the trustee named in said mortgage and held same for the testator of defendants, and advised the testator of defendants that the same was good without registration. (See deposition of Thomas Merriam printed transcript page 212, 193. Deposition of I. B. Merriam, page 93, 146-7.)

VII.

Defendants except to the allowance as a claim to be paid by them of the debt of I. B. Merriam, Jr., principal, $247.42, as ap-
438 pears from said exhibit and report because said claimant knew of the mortgage or deed of trust executed to the defendants' testator before the creation of said indebtedness, and with such knowledge credited the firm of Merriam & Son.

VIII.

Defendants except to the report of the referee that reasonable compensation to Williams & Lancaster and Pritchard & Sizer, as attorneys for the trustees, would be $15,098.73; (1) because said allowance is excessive, and (2) because reference to ascertain the compensation of said attorneys was not authorized by the decree of the Circuit Court of Appeals.

IX.

Defendants except to the allowance in favor of said attorneys as a claim of charge against them (1) because not authorized by the decree of the Circuit Court of Appeals, and (2) because not warranted by any provision of the Bankruptcy Act.

BROWN & SPURLOCK.

(Endorsed:) Filed Mar. 13, 1906, Horace Van Deventer, Clerk.

Be it remembered that at a District Court of the United States begun and held for the Southern Division of the Eastern District of Tennessee, at the court rooms in the city of Chattanooga, Tennessee, within said district and the Sixth Circuit, on the first Monday, it being the 2d day of April, A. D. 1906. Present and presiding the Honorable C. D. Clark, District Judge.

Among the proceedings had were the following, to wit:

TUESDAY, *April 17th*, 1906.

Court met pursuant to adjournment.

Present and presiding the Honorable C. D. Clark, judge of the United States District Court for the Eastern and Middle Districts of Tennessee.

Decree.

In re I. B. MERRIAM, Bankrupt.

No. 517.

H. F. ROGERS, Trustee of I. B. Merriam, Bankrupt,
v.
E. J. PAGE and ROBERT MARKERT, Executors of Thomas Merriam, Deceased.

This cause came on to be heard before the Hon. Chas. D. Clark, Judge, etc., on the exceptions of defendant to the report of Joe V. Williams, Special Master, filed in the cause on the 26th day of February, 1906; upon consideration whereof the court is of the opinion that none of said exceptions are well taken, and the
439 same are overruled and disallowed, and said report is hereby, upon motion of the plaintiff, in all things confirmed. Said report and the exhibits thereto are in the words and figures following, to wit:

(The Special Master's report here referred to has been heretofore copied and appears on page 70 of this record.)

And it appearing from said report that the aggregate amount of all claims which have been proved against the estate of the bankrupt I. B. Merriam, with interest thereon to January 15, 1906, is the sum of $60,394.94; that the total amount of compensation due the trustee is the sum of $756.27, and the total amount of compensation due the referee is $603.94; that the total amount of the expenses of the receiver, aside from the fees of his attorneys for services in connection with this litigation, is the sum of $1,232.90; and that reasonable compensation to Williams & Lancaster and Pritchard & Sizer, as attorneys for the said trustee, for their services rendered in this cause would be the sum of $15,098.73; making the total amount of the claims against the bankrupt, and the expenses and fees of the trustee, not including the costs of the bankruptcy cause, the sum of $78,086.78—and that the total amount of the assets of the bankrupt's estate which came into the hands of the trustee was $2,631.33—the facts are so adjudged.

And it further appearing that under the opinion and decree of the Circuit Court of Appeals in this cause, the defendants, as executors of Thomas Merriam, deceased, must account for the proceeds of the sale of the bankrupt's interest in the coal lands described in the pleadings in the cause, in so far as the same were applied to the payment of debts and demands due from the said bankrupt to the said Thomas Merriam, or, at the demand of said Thomas Mer-

riam, to the payment of debts and claims upon which he was liable for the purpose of exonerating him, with interest on the sum so applied from the date of such application, only, however, to the extent necessary for the payment of the debts proven against the bankrupt, the expenses and fees of the trustee, and the costs of the bankruptcy cause; and it appearing from the records in the cause that the total amount applied to payment of debts due from the bankrupt to Thomas Merriam and, on demand of said Thomas Merriam, to the payment of debts and claims on which he was liable, for the purpose of exonerating him, is the sum of $61,254.30, that the date on which said sum was so applied was June 1, 1903, that interest thereon from the date of such application to January 15, 1906, is the sum of $9,637.24, making in all the sum of $70,891.54—the facts are so adjudged.

440 And it appearing from the foregoing adjudication that the entire sum applied to the payment of debts and claims due to Thomas Merriam and on which he was liable as aforesaid, with interest thereon, is less than the claims and debts proven against the bankrupt, and the expenses, fees and costs aforesaid; it is therefore ordered, adjudged and decreed that plaintiff H. F. Rogers, as trustee of the estate of I. B. Merriam, bankrupt, have and recover of the defendants E. J. Page and Robert Markert, as executors of the estate of Thomas Merriam, deceased, to be paid and satisfied out of the goods and chattels, lands and tenements of said estate in the hands of said executors the said sum of $70,891.54, with interest thereon from January 15, 1906, to the date when the same shall be paid, and all the costs of this cause; for all of which execution is awarded.

Defendants by their att'ys except to this decree.

O. K.

B. & S.

Enter this.

CLARK, *J.*

In the United States District Court for the Southern Division of Eastern District of Tennessee.

In re I. B. MERRIAM, Bankrupt.

No. 517.

H. F. ROGERS, as Trustee of I. B. Merriam, Bankrupt,

vs.

E. J. PAGE ET AL., as Executors of Thomas Merriam, Deceased.

Stipulation of Parties.

To save the expense of copying and printing the proofs of claims filed against I. B. Merriam, bankrupt, and exhibited with the deposition of D. L. Grayson taken in the reference and in accordance with the mandate of the Court of Appeals, the following stipulation is made:

Each of the claims filed against said estate was proven by affidavit in some one of the forms prescribed by the Supreme Court of the United States. The printed blank in each case was filled out, sworn to, and had attached the account, drafts, notes or other evidences of indebtedness described in the affidavit; and was filed as a claim against the estate of I. B. Merriam.

The statement in the proof of each of the following claims shows the consideration of the indebtedness, the evidence of indebtedness attached to the affidavit, and the amount (not including interest subsequently accrued) was as set forth below. That is to say that each of the following creditors in his "Proof of Claim" as filed, described his debt or debts as they are described below:

441 American Syrup & Preserving Co., Principal..... $825.04
Accepted drafts dated in April, May and June, 1903, for "goods, wares and merchandise sold and delivered by the American Syrup & Preserving Co. to said Merriam & Sons."

Brooks Oil Co., Principal..... 162.55
Promissory note for "goods, wares and merchandise sold and delivered to said Merriam & Son at their special instance and request."

National Enameling & Stamping Co., Principal..... 67.02
Balance of account for "goods, wares and merchandise sold and delivered after crediting $25.00 paid March 31, 1903, and $25.00 paid June 2, 1903."

Kingdan & Co., Ltd., Principal..... 30.00
Account for "merchandise sold and delivered to Merriam & Son in which firm the said I. B. Merriam was a partner on its orders."

B. Frank & Sons, Principal..... 139.97
Account "goods, wares and merchandise sold and delivered to said Merriam & Son."

T. H. Cheek & Co., Principal..... 44.00
10 bags of rice sold to I. B. Merriam & Co., March 10, 1903.

J. Weller & Co., Principal..... 254.72
Acc. merchandise sold to Merriam & Son.

Carthage Tobacco Works, Principal 421.07
Account for smoking tobacco sold to Merriam & Son November and December, 1903, and May, 1904.

Brady Robinson & Co., Principal..... 28.10
Account for merchandise sold to Merriam & Son, February 9, 1903.

Georgia Soap Co., Principal..... 30.15
Account for merchandise sold to Merriam & Son in February and April, 1903.

N. Deitzen & Bro., Principal.....$1,236.57
Notes and account for goods, wares and merchandise furnished Merriam & Son.

Blue Grass Canning Co., Principal..... 116.16
Note for merchandise sold to Merriam & Son.

Levy & Goldsmith, Principal..... 63.75
Account goods and merchandise sold to Merriam & Son May 4, 1903.

442 M. Block & Co., Principal..... 70.79
Note dated May 28, 1903, for merchandise sold and delivered to Merriam & Son.

Lever Bros., Ltd., Principal..... 150.00
Account for merchandise sold to Merriam & Son December 20, 1902, and March 23, 1903.

National Biscuit Co., Principal..... 62.09
Account merchandise sold Merriam & Sons in November, 1902.

Philadelphia Lye & Chemical Co., Principal..... 36.25
Account merchandise sold and delivered Merriam & Son.

A. J. Aull, Principal..... 27.69
Account merchandise sold to Merriam & Son.

Phillips Snuff & Gum Co., Principal..... 15.30
Note dated May 20, 1903, for merchandise sold to Merriam & Son.

Price & Lucas Cider & Vinegar Co., Principal..... 24.20
Account merchandise sold to Merriam & & Son March 24, 1903.

M. S. Block Son & Co., Principal..... 26.20
Account merchandise sold to Merriam & Son January 20, 1903.

Willard Tobacco Works, Principal..... 52.00
Account merchandise sold to Merriam & Son.

R. M. Hughes & Co., Principal..... 241.22
Account merchandise sold and delivered to Merriam & Son in March, April, May and June, 1903.

St. John Cigar Co., Principal..... 142.80
Account note dated March 1, 1903, for merchandise sold Merriam & Son.

C. F. Sauer Co., Principal..... 30.00
Account note dated March 1, 1903, for merchandise sold Merriam & Son.

Indiana Match Co., Principal..... 110.48
Account merchandise sold to Merriam & Son, January 26, 1903.

J. H. Allison & Co., Principal..... $20.57
Account merchandise sold Merriam & Son.

The Williams Bros. Co., Principal..... 211.44
Account merchandise sold Merriam & Son December 2, 1902.

C. F. Ware Coffee Co., Principal..... 116.25
Account merchandise sold Merriam & Son March
443 24, 1903.

Ohio Match Co., Principal..... 126.44
Account merchandise sold to Merriam & Son September 30, 1902.

W. H. Dudley & Co., Principal..... 89.00
Account merchandise sold to Merriam & Son, March 3, 1903.

O. & W. Thum, Principal..... 12.61
Account merchandise sold to Merriam & Son.

Nordleinger-Charlton Fireworks Co., Principal..... 34.30
Account merchandise sold to Merriam & Son.

Jacob Dold Packing Co., Principal..... 18.00
Account merchandise sold to Merriam & Son December, 1902.

The Mutual Rice Mill, Ltd., Principal..... 50.78
Account merchandise sold to Merriam & Son, May, 1902.

Penn & Watson, Principal..... 183.71
Account notes of Merriam & Son dated April 25, 1903.

Enterprise Soap Works, Principal..... 82.51
Balance on note and account merchandise sold to Merriam & Son.

T. A. Snow & Co., Principal..... 37.90
Acc. merchandise sold to Merriam & Son in 1901 and 1902.

Steinwender-Stoffregen Coffee Co., Principal..... 289.76
Account merchandise sold to Merriam & Son April and May, 1903.

Wm. Demuth & Co., Principal..... 49.50
Account merchandise sold to Merriam & Son November 24, 1902.

National Paper Co., Principal..... 62.67
Acc. merchandise sold to Merriam & Son, May 6, 1903.

Crystal Oil Co., Principal..... 25.21
Account merchandise sold to Merriam & Son May 6, 1902.

Frank W. Wynne & Son, Principal..... 53.49
Account merchandise sold to Merriam & Son January and February, 1903.

Fritts & Weihl, Principal..... $133.33
Notes dated May 21, 1903, merchandise sold to Merriam & Son.

Greenville Tobacco Mfg. Co., Principal..... 121.59
Account merchandise sold to Merriam & Son in
444 April and May, 1903.

Ault Woodenware Co., Principal..... 126.30
Note dated Feb. 14, 1903, merchandise sold Merriam & Son.

Illinois Canning Co., Principal..... 33.50
Account merchandise sold Merriam & Son January and February and March, 1902.

W. G. Dean & Son, Principal..... 78.54
Account merchandise sold Merriam & Son July, September and December, 1902; January and April, 1903.

Kellogg & Shedden, Principal..... 117.75
Account merchandise sold Merriam & Son October 31, 1902.

Woolson Spice Co., Principal..... 35.00
Balance of note dated April 24, 1902, for merchandise sold Merriam & Son.

Merryman Biscuit Co., Principal..... 81.17
Account merchandise sold Merriam & Son in December, 1902.

Phœnix American Pipe Works, Principal..... 38.50
Account merchandise sold Merriam & Son, December 2, 1901.

Great Western Cereal Co., Principal..... 84.00
Account merchandise sold Merriam & Son in January, March and April, 1903.

American Chicle Co., Principal..... 102.00
Account merchandise sold Merriam & Son.

Genesee Pure Food Co., Principal..... 24.30
Account merchandise sold Merriam & Co., March 27, 1903.

Force Food Co., Principal..... 40.50
Merchandise sold Merriam & Son April 13, 1903.

Atlantic Peanut Co., Principal..... 33.75
Balance of account merchandise sold Merriam & Son November 10, 1902.

James Pyle & Sons, Principal..... 35.58
Balance of account merchandise sold Merriam & Son October 31, 1902.

G. Penn Sons Tobacco Co., Principal..... 155.06
Balance of notes of Merriam & Son dated July 7, 1902, for goods sold to them.

National Starch Co., Principal..... $68.75
Account of merchandise sold to Merriam & Son March 18, 1902.

Leopold Miller & Sons, Principal..... 83.56
445 Account protested check of Merriam & Son dated May 5, 1903, for merchandise sold to them in November, 1902, and February, 1903, with protest fees added.

Chatfield & Woods Co., Principal..... 26.47
Account for merchandise sold to Merriam & Son in November, 1902.

Scholtz Bros. & Co., Principal..... 449.70
Merchandise sold to Merriam & Son in 1901 and 1902.

Thomas N. Merriam, Principal..... 987.42
Account for salary to June 9, 1903, as traveling salesman for Merriam & Son.

I. B. Merriam, Jr., Principal..... 247.42
Account for salary to June 9, 1903, as bookkeeper and salesman for Merriam & Son.

N. R. Haymore, Principal..... 80.78
Note dated May 8, 1902, for services as traveling salesman for Merriam & Son.

D. M. Coffman, principal..... 500.00
Note dated July 9, 1902, money borrowed by Merriam & Son.

This agreement has no reference to other claims filed against I. B. Merriam, Bankrupt.

BROWN & SPURLOCK,
Att'ys for Def'ts.
PRITCHARD & SIZER,
WILLIAMS & LANCASTER,
Att'ys for Comp.

(Endorsed:) Filed May 14, 1906. R. M. Watkins, Deputy Clerk.

Petition for Appeal.

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee. In Equity.

H. F. ROGERS, Trustee of I. B. Merriam, Bankrupt,
vs.
E. J. PAGE & ROBERT MARKERT, Executors of Thomas Merriam, Deceased.

Petition for Appeal.

The above-named defendants, conceiving themselves aggrieved by the decree made and entered on the 17th day of April, 1906, in the above entitled cause, do hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Sixth Circuit for the reasons specified in the assignment of errors which is filed herewith, and they pray that this appeal may be allowed and that the transcript of the record, proceedings and papers upon
446 which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals of the Sixth Circuit.

Dated this 21st day of April, 1906.

BROWN & SPURLOCK,
Attorneys for Pl'ff.

The foregoing claim of appeal is allowed. This 21st day of April, 1906.

C. D. CLARK, *J.*

(Endorsed:) Petition for Appeal. Filed April 21, '06. R. M. Watkins, Deputy Clerk.

Assignment of Errors.

In the District Court of the United States for the Southern Division of the Eastern District ——. In Equity.

H. F. ROGERS, Trustee of I. B. Merriam, Bankrupt,
vs.
E. J. PAGE & ROBERT MARKERT, Executors of Thomas Merriam, Deceased.

Assignment of Errors.

And now on the 21st day of April, 1906, came the said defendants by their solicitors, and say that the decree in said cause is erroneous against the just rights of said defendant- for the following reasons:

I.

Because the report of the master confirmed by said decree failed to show, as the order of reference required, the nature of the claims reported.

II.

Because the said decree required the said defendants to pay a large list of partnership liabilities of the bankrupt, as set forth in their second exception to the report of the master, and over which, under the bankruptcy law, said defendants, as individual creditors of the bankrupt, were entitled to priority of payment.

III.

Because the said decree included claims in favor of the First National Bank amounting in all, without interest, to the sum of $16,079.41, whereas said claimant knew of the mortgage or deed of trust executed by I. B. Merriam, the bankrupt, to secure the testator of defendants, and accepted and held for its own benefit a note of $10,000.00 which was with its knowledge secured by the same deed.

IV.

Because the said decree included the sum of $4,962, without interest, payable to the J. L. Brown Banking Company, whereas said Banking Company knew of the deed of trust executed by the
447 bankrupt to the testator of defendants, and of the settlement made between said bankrupt and the testator of defendants, and never at any time, and has not yet, set up any claim to avoid priority of said mortgage.

V.

Because said decree includes in favor of Thomas N. Merriam, two claims amounting to $1,292.00, without interest, whereas said claimant was the trustee under the mortgage executed by the bankrupt in favor of the testator of defendants, and advised the said testator that said mortgage was good without registration.

VI.

Because said decree included a claim in favor of I. B. Merriam, Jr., for $247.42, whereas said claimant knew of the mortgage or deed of trust executed to the testator of defendants before the creation of said indebtedness, and with such knowledge credited the firm of Merriam & Son.

VII.

Because said decree included as a charge against defendants attorneys' fees due from plaintiff to Williams & Lancaster and Pritchard & Sizer, the decree in this respect being erroneous (*a*) because the allowance was excessive; (*b*) because the allowance of said claim, as against these defendants, was not authorized by the decree of the Circuit Court of Appeals, and (*c*) because the allowance of said fees as against defendants was not warranted by any provision of the bankruptcy act and was contrary to Sections 823 and 824 of the

Revised Statutes of the United States prescribing the cost taxable in suits at law and in equity.

Wherefore the said defendants pray that the said decree be reversed and a decree entered in accordance with their just rights.

BROWN & SPURLOCK,
Sol's for Def'ts.

(Endorsed:) Assignment of Error. Filed April 21, '06. R. M. Watkins, Deputy Clerk.

Bond on Appeal.

Know all men by these presents, that we, E. J. Page and Robert Markert, Executors of Thomas Merriam, deceased, as principals, and Foster V. Brown and Frank Spurlock, as sureties, are held and firmly bound unto H. F. Rogers, trustee of I. B. Merriam, bankrupt, in the full and just sum of one thousand ($1,000.00) dollars, to be paid to the said H. F. Rogers, trustee, etc., his certain attorneys, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

448 Sealed with our seals and dated this 21st day of April, in the year of our Lord, one thousand nine hundred and six.

Whereas, lately, at the District Court of the United States for the Southern Division of the Eastern District of Tennessee, in a suit pending in said court between H. F. Rogers, trustee of I. B. Merriam, bankrupt, plaintiff, and E. J. Page and Robert Markert, executors of Thomas Merriam, deceased, defendants, a decree was rendered against the said E. J. Page and Robert Markert, executors of Thomas Merriam, deceased, and they, having obtained an appeal, filed a copy thereof in the clerk's office of the said court to reverse in the aforesaid suit, and a citation directed to the said H. F. Rogers, Trustee of I. B. Merriam, bankrupt, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said Circuit, on the 14th day of May next.

Now, the condition of the above obligation is such that if the said E. J. Page and Robert Markert, Executors of Thomas Merriam, deceased, shall prosecute said appeal to effect and answer all costs, if they shall fail to make said plea good, then the above obligation to be void, else to remain in full force and effect.

R. C. MARKERT,
E. J. PAGE,
Executors of Thos. Merriam, Dec'd.
FRANK SPURLOCK.
F. V. BROWN.

Sealed and delivered in the presence of
M. E. MILES.

Approved by
C. D. CLARK, *J.*

(Endorsed:) Bond on Appeal. Filed April 21, '06. R. M. Watkins, Deputy Clerk.

Order Allowing Appeal.

Be it remembered, that at a District Court of the United States begun and held for the Southern Division of the Eastern District of Tennessee, at the court rooms in the city of Chattanooga, Tennessee, within said district and the Sixth Circuit, on the first Monday, it being the 2d day of April, A. D. 1906. Present and presiding the Honorable C. D. Clark, district judge.

Among the proceedings had were the fol-owing, to wit:

SATURDAY, *April 21st*, 1906.

Court met pursuant to adjournment.

Present and presiding the Honorable C. D. Clark, judge of the United States District Court for the Eastern and Middle Districts of Tennessee.

449 In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

H. F. ROGERS, Trustee of I. B. Merriam, Bankrupt,

vs.

E. J. PAGE & ROBERT MARKERT, Executors of Thomas Merriam, Deceased.

Upon petition of defendants by their attorneys, it was ordered that an appeal be and the same is hereby allowed in the above styled cause to have reviewed in the United States Court of Appeals for the Sixth Circuit the decree and proceedings heretofore had in this cause.

It is further ordered that the amount of bond on said appeal be and it is hereby fixed at the sum of one thousand ($1,000.00) dollars.

Enter this.

CLARK, *J.*

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit, ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the Eastern District of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between H. F. Rogers, trustee of I. B. Merriam, bankrupt, and E. J. Page and Robert Markert, executors of Thomas Merriam, deceased, a manifest error hath happened, to the great damage of the said E. J. Page and Robert Markert, executors of Thomas Merriam, deceased, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that

then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said circuit, on the* 14th day of May next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice
450 of the United States, the 21st day of April, in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States of America the one hundred and thirty.

[SEAL.] HORACE VAN DEVENTER,
Clerk of the District Court of the United States,
By R. M. WATKINS, *Deputy Clerk.*

Allowed by
C. D. CLARK, *J.*

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*Not exceeding 30 days from the day of signing the citation.

The United States Circuit Court of Appeals for the Sixth Circuit.

THE UNITED STATES OF AMERICA, *Sixth Judicial Circuit:*

To H. F. Rogers, trustee of I. B. Merriam, bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said circuit, on the 14th day of May next, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Southern Division of the Eastern District of Tennessee, wherein E. J. Page and Robert Markert, executors of Thomas Merriam, deceased, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this twenty-first day of April, in the year of our Lord, one thousand, nine hundred and six, and of the Independence of the United States of America the one hundred and thirtieth.

C. D. CLARK, *Judge.*

Service of foregoing notice is hereby acknowledged.

H. F. ROGERS, *Trustee,*
By WILLIAMS & LANCASTER, *Att'ys.*

Be it remembered, that at a District Court of the United States begun and held for the Southern Division of the Eastern District

of Tennessee, at the court rooms in the city of Chattanooga, Tennessee, within said district and the Sixth Circuit, on the first Monday it being the 2d day of April, A. D., 1906.

Present and presiding the Honorable C. D. Clark, District Judge.

Among the proceedings had were the following, to-wit:

MONDAY, *May 14th*, 1906.

451 Present and presiding the Honorable C. D. Clark, judge of the United States District Court for the Eastern and Middle Districts of Tennessee.

No. 517.

H. F. ROGERS, Trustee,
vs.
E. J. PAGE and ROB'T MARKERT, Ex'rs.

In re I. B. MERRIAM, Bankrupt.

For satisfactory reasons appearing the time allowed for preparing the transcript and forwarding same to the Circuit Court of Appeals at Cincinnati is extended thirty (30) days.

Enter this.
CLARK, *J.*

THE UNITED STATES OF AMERICA,
Eastern District of Tennessee, Southern Division, ss:

I, Horace Van Deventer, Clerk of the District Court of the United States within and for the district aforesaid do hereby certify that the foregoing 113 pages are a full, true and perfect copy of the originals as the same appear on file and of record in my office, as follows:

Order allowing trustee to file petition and granting restraining order filed June 26th, 1903.

Petition of H. F. Rogers, trustee, filed June 26th, 1903.

Order granting restraining order, etc., filed June 27th, 1903.

Answer of Thomas Merriam filed August 1st, 1903.

Order releasing Tenn. C. & L. Co. Filed Aug. 1st, 1903.

Decree against Thomas Merriam estate and order of reference filed July 2d, 1904.

Deposition of I. B. Merriam filed Aug. 30th, 1904.

Report of D. L. Grayson, commissioner, filed Aug. 30th, 1904.

Decree confirming report filed Sept. 22d, 1904.

Mandate from U. S. Circuit Court of Appeals, filed Dec. 8th, 1905.

Decree on mandate, filed Dec. 28th, 1905.

Deposition of D. L. Grayson, filed Feb. 26th, 1906.

Deposition of Geo. D. Lancaster, filed Feb. 26th, 1906.

Deposition of W. G. M. Thomas, filed Feb. 26th, 1906.

Deposition of Robt. Pritchard, filed Jan. 11th, 1906.

Report of special master, filed Feb. 26th, 1906.
Exceptions to report of special master, filed Mch. 13th, 1906.
Decree on report of special master, filed April 17th, 1906.
452 Stipulation of parties, filed May 14th, 1906.
Petition for appeal, filed April 21st, 1906.
Assignment of errors, filed April 21st, 1906.
Bond on appeal, filed April 21st, 1906.
Order allowing appeal, April 21st, 1906.
Writ of error, issued April 21st, 1906.
Citation.
Order extending time, filed May 14th, 1906.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Chattanooga, Tennessee, this 18th day of May, A. D., 1906.

HORACE VAN DEVENTER, *Clerk.*
[SEAL.] By R. M. WATKINS, *Deputy Clerk.*

453 And afterwards, to-wit: on the 29th day of May, A. D. 1907, an appearance was filed in said cause clothed in the words and figures following, to-wit:

No. 1570.

E. J. PAGE and ROBERT MARKERT, Executors of Thomas Merriam, Dec.,
vs.
H. F. ROGERS, Trustee in Bankruptcy of I. B. Merriam.

Frank O. Loveland, Clerk of said Court:

Please enter my appearance as Counsel for the appellants.

FRANK SPURLOCK.
FOSTER V. BROWN.

And afterwards, to-wit: on the 13th day of November, A. D. 1906, an entry was made on the journal of said court clothed in the words and figures following, to-wit:

Journal C, Page 332.

No. 1570.

PAGE & MARKERT, Executors, etc.,
vs.
H. F. ROGERS, Trustee.

Before Lurton, Severens, and Richards, *JJ.*

This cause is submitted on briefs of counsel without oral argument.

454 And afterwards, to-wit: on December 15th, 1906, a decree was entered in said cause clothed in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1570.

E. J. PAGE ET AL.
vs.
H. F. ROGERS, Trustee, etc.

Appeal from the District Court of the United States for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause be and the same is hereby affirmed with costs.

And afterwards, to-wit: on the 3rd day of January, A. D. 1907, an opinion was filed in said cause clothed in the words and figures following, to-wit:

Opinion.

455 Filed Jan. 3, 1907. Frank O. Loveland, Clerk.

No. 1570.

United States Circuit Court of Appeals, Sixth Circuit.

E. J. PAGE and ROBERT MARKERT, Executors of Thomas Merriam, Deceased, Appellants,
vs.
H. F. ROGERS, Trustee of I. B. Merriam, Bankrupt, Appellee.

Appeal from the District Court of the United States for the Eastern District of Tennessee.

Submitted November 13, 1906; Decided December 4, 1906.

Per Curiam:

This is a second appeal. The opinion upon the first appeal states the case (140 F. R. 596). In pursuance of our decree modifying the decree of the Court below, the District Judge directed a special master to report the amount of claims proved or provable against the bankrupt, and the costs and expenses of the administration of the

bankrupt estate, including fees of counsel for the bankrupt's trustee in this case.

The master reported that the total amount of claims and costs and expenses, including trustee's counsel fees, was $78,086.78. The total liability of the estate of Thomas Merriam to the bankrupt's trustee he reported at $70,891.54, including interest to Jan. 15, 1906. Upon this basis there was no surplus over and above the liabilities of the bankrupt's estate, and no room for a refusal to direct the payment of any sum less than the full liability of Thomas Merriam to the trustee. But the appellants assign as error
456 the allowance of $15,000.00 as counsel fees to the counsel employed by the trustee, first, because they say that under the mandate of this Court no counsel fees were allowed. This is a mistake. We expressly held that the appellants were liable for a sum sufficient to "pay all debts of every class which have been or may be proven against the bankrupt and the expenses of the trustee, his fee and the costs," provided the aggregate did not exceed the amount of the preference received by the testator, Thomas Merriam. The reasonable fee of counsel employed by the trustee to recover a voidable or fraudulent preference made by the bankrupt constitutes a part of the trustee's expenses and as such a part of the costs and expenses of administration entitled to preferential payment. Davidson *v.* Friedman, 140 F. R. 853. These counsel fees were therefore a part of the trustee's expenses and allowable under our mandate. It is next objected that this allowance was excessive. We are not altogether prepared to approve of the large compensation allowed counsel in view of the strong admonition in the direction of economy found in the bankrupt law. But if we assume, that under the peculiar mandate of this Court, that the District Judge was authorized to refer the question of the aggregate sum necessary to pay all probable claims, costs and expenses to a special master for a report, and that we would be authorized to consider an exception to an allowance for the counsel fees for the attorneys employed by the bankrupt's trustee upon the ground that it was so grossly excessive as to be an abuse of the sound discretion of the court below, we see no sufficient reason under the facts of this case for doing so. The total liability of the appellants is more than $7,000.00 less than the aggregate of the debts and expenses, including this allowance to counsel. The result is that about one-half of this allowance is paid by the creditors, who are not complaining. Unless, therefore, we should hold that this allowance was excessive to the extent of more than one-half it would not benefit appellants. That we are not willing to do. All of the assignments are overruled and decree affirmed.

457 And afterwards, to-wit on the 16th day of January a petition for appeal and assignment of errors were filed in said cause clothed in the words and figures following, to-wit:

United States Circuit Court of Appeals, Sixth Circuit. In Equity.

No. 1570.

E. J. PAGE and ROBERT MARKERT, Executors of Thomas Merriam, Deceased, Appellants,
vs.
H. F. ROGERS, Trustee of I. B. Merriam, Bankrupt, Appellee.

The above named defendants, Appellants, E. J. Page and Robert Markert, the Executors of Thomas Merriam, deceased, conceiving themselves aggrieved by the final decree made and entered on the 15th day of December, 1906 and orders entered on former days in said cause, do hereby appeal from said final order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and they pray that this appeal may be allowed, and that transcript of the record, proceedings and papers upon which said decree was made and duly authenticated may be sent to the Supreme Court of the United States.

458 This 16th day of January, 1907.

KING, WATERS & PAGE,
BROWN & SPURLOCK,
Attorneys for Defendants.

The foregoing claim of appeal is allowed, this 16th day of January, 1907.

(Signed) HORACE H. LURTON,
Presiding Circuit Judge.

(*Assignment of Errors.*)

United States Circuit Court of Appeals, Sixth Circuit.

E. J. PAGE and ROBERT MARKERT, Executors of Thomas Merriam, Deceased, Appellants,
vs.
H. F. ROGERS, Trustee of I. B. Merriam, Bankrupt, Appellee.

Assignment of Errors.

And now on the 16th day of January, 1907, came the said defendants by Brown & Spurlock, their solicitors, and show that the decree in said cause is erroneous and against the just rights of said defendants for the following reasons:

I.

The Court erred in finding that I. B. Merriam, the bankrupt, was insolvent when on June 1, 1903, he conveyed his lands to
459 appellant's testator for the purpose of settling the debts then due from him to appellant's testator, and upon which the said

testator was endorser, because said finding was reached by including and estimating with the debts which the said bankrupt owed individually, the debts which were owed by Merriam & Son, the firm of which said bankrupt was a member, and over which debts appellant's testator as an individual creditor had a right of priority of payment.

II.

In finding that Thomas Merriam, appellant's testator, when his debts and those upon which he was endorser were settled, as aforesaid, had reasonable cause to believe that the said bankrupt was insolvent and intended to prefer him as a creditor: (1) Because there is no evidence to support said finding; (2) because it was necessary in reaching this conclusion, to impute to appellant's testator, as the Court expressly did, the knowledge of the facts that he could have acquired by an investigation of the bankrupt's financial condition; and (3) because, as the record now stands, this inquiry would not have revealed whether the bankrupt was or not insolvent counting only his individual debts, or those in the same class with the debts due to appellant's testator.

460 III.

The Court erred in holding that appellant's testator received a voidable preference in retaining out of the price he contracted to pay to I. B. Merriam for said lands, all debts due to him from the said I. B. Merriam and for which he was liable as endorser:

Because the evidence shows that on November 15, 1902, said I. B. Merriam agreed in writing to convey said land to appellant's testator, and that said sale was made, as then agreed by and between the parties, for the purpose and as a means of satisfying all the debts due from the vendor to the vendee or for which the latter was liable as endorser.

Wherefore appellant's testator as vendee had the legal right, when said sale was consummated by conveyance on June 1, 1903, to discharge the purchase price by a cancellation and surrender of the debts due to him from his vendor.

IV.

Because the evidence shows that at the time of said sale and the appropriation of the proceeds thereof, thirty-five thousand ($35,000) dollars of the indebtedness due from I. B. Merriam to Thomas Merriam was secured by a mortgage or deed of trust on said
461 lands executed November 24, 1897, and delivered to the mortgagee, and which, although not recorded, was good under the laws of Tennessee as between parties thereto; and at the time said mortgage debt was paid by the sale aforesaid, no creditor of I. B. Merriam had fixed a lien upon said land by attachment, execution or other legal proceeding. To the extent of said mortgage debt, the appropriation of the proceeds of said sale was, therefore, in satisfaction of a valid lien created more than four months before the filing of the petition in bankruptcy.

V.

The Court erred in finding that said mortgage was not executed in good faith and was void for fraud: (1) Because there is no evidence in the record to support said finding, and (2) because no such issue was presented by the pleadings.

VI.

In holding that appellants as individual creditors of the bankrupt whose debts were paid out of individual property were liable to appellee not only for the entire amount of the individual debts of the bankrupt, but for the entire amount of the partnership debts of Merriam & Son also.

462 VII.

In holding and adjudging that appellants were liable, in addition to the entire amount of the individual and partnership debts of the bankrupt, for the fees of counsel of appellee amounting to $15,000.

Wherefore the said defendants pray that the said decree be reversed, and that said Court may be directed to enter a decree dismissing plaintiff's bill.

KING, WATERS & PAGE,
BROWN & SPURLOCK,
Solicitors for Defendants.

463 And afterwards, to-wit: on the 31st day of January, A. D. 1907, a præcipe for transcript was filed in said cause clothed in the words and figures following, to-wit:

United States Circuit Court of Appeals, Sixth Circuit.

No. 1570.

H. F. ROGERS, Trustee of the Estate of I. B. Merriam, Bankrupt, Appellee,
vs.
E. J. PAGE and ROBERT MARKERT, Executors of the Estate of Thomas Merriam, Dec., Appellants.

To Frank O. Loveland, Clerk of the Circuit Court of Appeals for the Sixth Circuit:

Please prepare a transcript of record on the original appeal in this cause, being Cause No. 1389, as heard in your Court, the same to be certified as part of the record on appeal prayed and granted to the Supreme Court of the United States.

BROWN & SPURLOCK,
Attorneys for Defendants.

463½ And afterwards, to-wit: on the 13th day of February, A. D. 1907 an order was entered on the journal of said court clothed in the words and figures following, to wit:

Journal C, page 365.

E. J. PAGE and ROBERT MARKERT, Executors, etc.,
vs.
H. F. ROGERS, Trustee of I. B. Merriam, Bankrupt.

For cause shown the time for filing the record on appeal in the Supreme Court of the United States is hereby extended for thirty days.

464 And afterwards to-wit on the 23rd day of February A. D. 1907 an appeal bond was filed in said cause clothed in the words and figures as follows, to-wit:

United States Circuit Court of Appeals, Sixth Circuit.

E. J. PAGE and ROBERT MARKERT, Executors of Thomas Merriam, Deceased, Appellants,
vs.
H. F. ROGERS, Trustee of I. B. Merriam, Bankrupt, Appellee.

Know all men by these presents that we, E. J. Page and Robert Markert, Executors of Thomas Merriam, Deceased, both of the City of Syracuse and State of New York, and The United States Fidelity & Guaranty Company of Baltimore, Md. are held and firmly bound unto the above named H. F. Rogers, Trustee of I. B. Merriam, Bankrupt, in the sum of One thousand and no/100 Dollars ($1,000.00) (*sic*) paid to the said H. F. Rogers, Trustee, etc., for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these
465 presents. Sealed with our seals, and dated the 18th day of February, in the year of our Lord, one thousand nine hundred and seven.

Whereas, the above named E. J. Page and Robert Markert Executors of Thomas Merriam, Deceased, have prosecuted an appeal to the Supreme Court of the United States, to reverse a decree rendered in the above entitled suit, by the United States Circuit Court of Appeals for the Sixth Circuit.

Now therefore, the condition of this obligation is such, that if the above named E. J. Page and Robert Markert, Executors of Thomas Merriam, deceased shall prosecute said appeal to effect and answer all costs if they shall fail to make said appeal good, then this obli-

gation shall be void, otherwise the same shall be and remain in full force and virtue.

R. MARKERT,
Executor of Thomas Merriam, Deceased.
E. J. PAGE,
Executor of Thomas Merriam, Deceased.
THE UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MD.
GEORGE H. McGUIRE, *Attorney in Fact.*

[SEAL.]
Attest:
W. W. MAGEE.

Sealed and delivered and taken *as* acknowledged as to Robert C. Markert and E. J. Page, as executors etc. this the 18th day of February, 1907.

[SEAL.] HENRY M. LOCKWOOD,
Notary Public, Onondaga County, N. Y.

466 Approved by
HON. HORACE H. LURTON,
Sr. Circuit Judge.

CITY OF SYRACUSE,
County of Onondaga, State of New York, ss:

On this 19th day of February, 1907, before me personally appeared George H. McGuire, Attorney-in-fact of the United States Fidelity & Guaranty Company a corporation created and existing under and by virtue of the Laws of the State of Maryland, and duly authorized to transact business in the State of New York, with whom I am personally acquainted, who being by me duly sworn, said: That he resided in the City of Syracuse; that he is the attorney-in-fact of The United States Fidelity & Guaranty Company; that he knew the corporate seal of said Company; that the seal affixed to the annexed instrument is such corporate seal; that it was affixed thereto by the order of the Board of Directors of said Company, and that he signed said instrument at Attorney-in-fact of said Company by like authority.

[SEAL.] HENRY M. LOCKWOOD,
Notary Public, Onon. Co., N. Y.

(Printed form of Power of Attorney attached to this bond.)

467 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the two appeals in this court in the case of E. J. Page and Robert Markert,

Executors of Thomas Merriam, Deceased *vs.* H. F. Rogers, Trustee of I. B. Merriam, Bankrupt Nos. 1389 & 1570, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 25th day of February A. D. 1907.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

468 Supreme Court of the United States of America.

To H. F. Rogers, Trustee of I. B. Merriam, Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at Washington on the 14th day of February, 1907, pursuant to an appeal filed in the Clerk's Office of the United States Circuit Court of Appeals for the Sixth Circuit, wherein E. J. Page and Robert Markert, Executors of Thomas Merriam, deceased, are appellants, and H. F. Rogers, Trustee of I. B. Merriam, Bankrupt, is appellee, to show cause, if any there be, why the judgment in said petition of appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this the 16th day of January, in the year of our Lord, nineteen hundred and seven.

HORACE H. LURTON,
Circuit Judge.

Service of this citation acknowledged, this the 17th day of January, 1907.

WILLIAMS & LANCASTER,
Att'ys for H. F. Rogers, Trustee, etc.

Endorsed on cover: File No. 20,614. U. S. circuit court of appeals, 6th circuit. Term No. 254. E. J. Page and Robert Markert, executors of Thomas Merriam, deceased, appellants, *vs.* H. F. Rogers, trustee of I. B. Merriam, bankrupt. Filed March 13th, 1907. File No. 20,614.

SUPREME COURT OF THE UNITED STATES.

October Term, 1897.

No. 89.

E. J. Page and Robert Morlatt, Executors of Thomas Morrison, deceased,

Appellants,

vs.

H. F. Rogers, Trustee of T. R. Morrison, Bankrupt.

BRIEF FOR APPELLANTS.

BROWN & SPURLOCK,
Times Building,
Chattanooga, Tennessee.

KING, WATERS & PAGE,
301 S. A. & K. Building,
Syracuse, N. Y.,
Solicitors for Appellants.

S. H. Parish, Law Printer, Syracuse, N. Y.

SUPREME COURT OF THE UNITED STATES.

October Term, 1907.

E. J. Page and Robert Markert, Executors of Thomas Merriam, deceased,

Appellants,

vs.

H. F. Rogers, Trustee of I. B. Merriam, Bankrupt.

May it Please Your Honors:

This is a suit by a Trustee in Bankruptcy to recover, as a voidable preference, the proceeds of a tract of land, which had been sold by the bankrupt, to satisfy debts he owed to the vendee.

The facts to which it is necessary to refer, as a preface to the statement of the issues involved, are as follows:

I. B. Merriam, the bankrupt, lived at Chattanooga, Tennessee, and was a wholesale grocery merchant. He continued this business with successive partners from 1879 up to the time of filing his petition in bankruptcy on

June 9, 1903—his last partner being his son, Frank Merriam, who succeeded one A. D. Story in 1896. The firm of Merriam & Son continued the business at Chattanooga from 1896 up to about the first of June, 1903.

Thomas Merriam, an elder brother of the bankrupt, resided at Syracuse, New York, until he died some time after the institution of this suit. He was prosperous in business and left a large estate to his wife and daughter who survived him.

His brother Isaac, in addition to carrying on the wholesale grocery business, had bought a large amount of real estate in and around Chattanooga prior to the year 1890. This real estate had cost him a large amount of money and a considerable portion of it had been bought on a credit. He had carried it with great difficulty and evident detriment to his other business from the time of its purchase until his bankruptcy, and it then constituted his chief asset.

About 1892 Thomas Merriam began to make loans to his brother which were increased from time to time until these debts, with accommodation endorsements, amounted, on the 24th day of September, 1897, to $35,000. At this time I. B. Merriam and one G. H. Jarnagin, jointly, owned a tract of coal land, containing ten thousand acres, lying in Cumberland County, Tennessee, in the mountainous regions and some distance from Chattanooga. The owners of this property, which was of a speculative value, were at the time last stated, and had been previously, making efforts to sell it, and these efforts

were continued by repeated negotiations until it was sold to Thomas Merriam and associates by contract signed November 15, 1902.

On the 24th day of September, 1897, I. B. Merriam executed and delivered to his brother Thomas a note for $35,000, due in one year from date, which was intended to represent and stand as collateral security for the debts and endorsements then existing and their subsequent renewals. On the same day, and to secure the payment of this note, I. B. Merriam and his wife executed an acknowledged a deed of trust conveying to their son Thomas N. Merriam, as Trustee, an undivided half interest in the tract of coal land. This deed of trust was never recorded but the note secured by it was delivered to Thomas Merriam at the time of its execution. After the execution of this note and mortgage Thomas Merriam continued to endorse for his brother and to make loans to him until the total, with interest, amounted to over $60,000. So continuously did he aid his brother in this way that one of the charges made in this case is that he was his brother's financial backer. This charge is founded on the evidence that he never declined any request of his brother for money or credit. And he never requested or called for any settlement of the indebtedness due to him until the summer of 1902, when he was stricken with the disease of which he subsequently died. He did then give notice to his brother that he desired a payment of what was due to him, and wrote to him that unless a negotiation then pending resulted in a sale of the coal lands he would himself arrange for its purchase.

None of the many negotiations looking to a sale of the coal lands had up to this time materialized, though they had been carried on continuously since about 1896 or before. Thomas Merriam knew of these efforts to sell the lands and expected if they were sold that his debts would be paid. I. B. Merriam had creditors at Chattanooga who also knew of the negotiations to sell and who had been promised payment out of the proceeds. Several of the largest of these local creditors held mortgages on the real estate at Chattanooga.

In November, 1902, Thomas Merriam and W. Herbert Robinson signed a written agreement to buy these lands from I. B. Merriam and his co-tenant, Jarnagin, for $150.000. The object of Thomas Merriam in making this purchase was to secure the payment of what was due to him and of such debts as he had endorsed for his brother. This sale was consummated by a conveyance made on June 1, 1903, when a settlement was made at Syracuse between Thomas Merriam and his brother to ascertain the balance of indebtedness between them. The total of the debts, paid by the sale of the land, as already stated, with interest, amounted to over $60,000 including the $35,000 secured by the deed of trust. The amount was deducted from the purchase money going to I. B. Merriam and only the balance was paid to him at the time of the conveyance. In this settlement the note for $35,000 was surrendered by Thomas Merriam. The entire interest in the land of both owners was purchased by Thomas Merriam and associates who organized a development company and took over the title. In fact, the contract of sale signed in November, 1902, gave the pur-

chasers the option to pay a part of the purchase price in the stock of this company, and this option was exercised by transferring to each of the vendors $20,000 of this stock.

As already stated, I. B. Merriam owed to his creditors at Chattanooga a large amount in addition to the debts settled by this conveyance. This indebtedness consisted of a large number of notes and accounts against the firm of Merriam & Son of comparatively recent origin, and a still larger amount of individual debts which he had been carrying since about 1896. Some of these old debts had been secured by mortgages covering the whole of his real estate. These home creditors had been led by I. B. Merriam to expect that from the proceeds of the sale of his coal lands their debts would be paid, and when he returned from Syracuse without means sufficient to do so, some of them, who had been promised payment, gave notice that they would immediately proceed to enforce their demands. He thereupon filed his petition in bankruptcy. The debts scheduled by him, including the liabilities of Merriam & Son, amounted to about $75,000 or $80,000, which his home property, at forced sales, was wholly insufficient to pay. There was no adjudication as to the firm of Merriam & Son, but, as stated, its debts were scheduled among the liabilities of I. B. Merriam.

Within a short while after the petition of I. B. Merriam was filed he was examined at length before his creditors, and the foregoing is an outline of his statements made at these examinations before this suit was brought.

He filed as exhibits to his deposition before his creditors the note for $35,000 dated September 24, 1897, and the deed of trust of the same date securing the payment of the note. (Rec. pp. 111, 122, 136.)

THE PLEADINGS.

The complaint of the trustee filed on the 26th day of June, 1903, averred as follows:

1. That I. B. Merriam had filed his petition and had been adjudged a bankrupt.

2. That his schedule of assets included a stock of merchandise and fixtures valued at $1100., accounts and bills receivable valued at $1500., and real estate within Hamilton County valued at $40,000; that the liabilities scheduled aggregated $75,000 of which $38,000 was secured by mortgages on real estate.

3. That there were additional assets within the jurisdiction of the Court and which should be impounded and subjected to the payment of the scheduled debts. The asset thus referred to was the one-half interest of I. B. Merriam in the ten thousand acres of coal lands which it was averred the bankrupt and G. H. Jarnagin owned on June 1, 1903, when they conveyed it to Thomas Merriam who about the same time conveyed it to The Tennessee Coal & Lumber Company, a corporation organized to take the title and of which Thomas Merriam was the principal stockholder.

4. That the consideration expressed in said deed was nominal and the real facts were as follows:

For some years prior to this time I. B. Merriam had been in failing circumstances and insolvent within the meaning of the bankruptcy law; that for the last five years preceding June 1, 1903, his assets had remained about the same except that his stock of goods, he being a merchant, had diminished in size; that for eight or nine years his brother Thomas had been his financial backer and had been making him loans and endorsing his paper to an amount aggregating a large sum, and had known for the last three or four years that I. B. Merriam was insolvent. That "the said bankrupt, for the purpose of gaining additional indulgences from his many creditors and to save himself from insolvent proceedings," had often during the last two years represented to his creditors that he was about to sell his coal lands for $20.00 per acre, and that if he did so he would pay them in full; but if unduly pressed he would be prevented from making said sale. That "relying upon these assurances, the many creditors of said bankrupt had indulged him until the first day of June last" when said lands were sold.

After this recital of facts it is charged:

First, that no valuable consideration was paid by Thomas Merriam for the conveyance, and that it was made to hinder, delay and defeat the creditors of the vendor as the vendee well knew at the time.

Second, that the purchase price which Thomas Merriam agreed to pay was $75,000, but as it had not been

paid it was still due and unpaid and was a lien on said lands which should be enforced by impounding the real estate conveyed.

Third, that Thomas Merriam claimed that the agreed purchase price of $75,000 "was appropriated in liquidation of the claims or demands that said defendant had against said bankrupt for money advanced to and endorsements made for said bankrupt; that if the proceeds of the sale were so appropriated at the time thereof Thomas Merriam not only had reasonable cause to believe but actually knew that I. B. Merriam was insolvent and intended by said appropriation to give him an unlawful preference.

It was further averred that the Tennessee Coal & Lumber Company was not an innocent purchaser but took the title knowing of the fraudulent purpose for which it was conveyed to Thomas Merriam. That as a foreign corporation it had no right to take title to said real estate because it had failed to register its charter as the law of the State required. The prayer of the complaint was:

That Thomas Merriam and the Tennessee Coal & Lumber Company be made parties by publication. That the sale of the real estate be set aside as fraudulent and void; or, if mistaken in this relief, that a lien be enforced for the $75,000 of unpaid purchase money due for I. B. Merriam's one-half interest in said lands; *or that the $75,000 appropriated by Thomas Merriam in satisfaction of loans made by him to said bankrupt and for endorsements made for him be declared void as an unlawful pref-*

erence and that a decree be rendered against the defendants for said sum. (Rec. pp. 2-7).

On the same day, June 26, 1907, an order was entered reciting the prayer of the complainants to impound the real estate and enforce the lien and requiring both of the defendants to appear and defend on or before the first day of the following September, and restraining them from selling or encumbering the real estate described in the complaint and in said order. (Rec. p. 9).

To give the District Court in Tennessee jurisdiction of this case it was legally necessary to charge that the sale of the land was fraudulent, and that the Tennessee Lumber & Coal Company was not an innocent purchaser. The suit to recover the proceeds of the sale because paid to Thomas Merriam in violation of Section 60b was a personal action and inconsistent with the other charges of the complaint; but on August 1, 1903, the defendant Thomas Merriam agreed to enter his personal appearance in said suit on condition that the Trustee dismiss his petition as to the Tennessee Lumber & Coal Company and abandon any right to recover against it or to impeach its title to the lands conveyed to it by Thomas Merriam. (Rec. p. 16.)

Having in this manner submitted the question of his personal liability to the Court in Tennessee Thomas Merriam filed his answer which was in substance as follows:

That he had no knowledge concerning the allegations of the complaint that I. B. Merriam filed a petition and had been adjudged a bankrupt, or of the schedule of

debts and assets filed in the proceeding. He admitted that I. B. Merriam was the owner, as alleged, of the one-half interest in the ten thousand acres of coal lands situated in Cumberland County, Tennessee, and which was conveyed to him, on or about the first day of June, 1903, jointly by I. B. Merriam and his wife, and G. H. Jarnagin, the owner of the other half interest, that at the same time he conveyed the land to the Tennessee Lumber & Coal Company, a corporation chartered under the laws of New York; that the conveyance of said lands to him was consummated in Syracuse and the deeds were shortly thereafter registered in the Registers office of Cumberland County.

It is alleged that at the time said land was conveyed to him by I. B. Merriam the *"title was encumbered to an amount of more than $40,000 by two several trust deeds, one for the benefit of the defendant to secure him to the extent of $35,000 given by said I. B. Merriam to Thomas Merriam as Trustee, and dated and delivered on or about April 11, 1899; and one for the benefit of the First National Bank of Chattanooga to secure said bank to the extent of $4000, the date of which deed is unknown to defendant."* (Rec. p. 11).

He denied specifically all the allegations of the complaint that I. B. Merriam was insolvent for a number of years before or at the time of said sale or that his assets and debts had continued the same except for four or five years, or that the defendant knew either before or at the time of the sale that he was insolvent.

He denied that the sale was made without considera-

tion or for the purpose of hindering and defeating the vendor's creditors, or that the price agreed to be paid was not in fact paid. On the contrary he averred that the agreed consideration was a full and fair one and it was in fact paid in full.

He denied that he knew his brother I. B. Merriam was insolvent, or that he had any reasonable cause so to believe, or that a preference was in fact intended or that he obtained any unlawful preference.

He affirmatively averred "that he not only did not know that he was obtaining a preference over other creditors of his brother, I. B. Merriam, but that he had no reasonable cause to believe that said I. B. Merriam was insolvent. That he had no knowledge or suspicion that he was insolvent at the time of this transaction, but on the contrary understood and verily believed the said I. B. Merriam had money sufficient to pay all debts and demands owed by him."

The defendant's version of said transaction was thus stated:

"That this defendant has loaned from time to time since, during or about the year 1892, to said I. B. Merriam various sums of money and has endorsed various notes for said I. B. Merriam.

That during the summer of 1897 the said I. B. Merriam executed and delivered to the trustee therein named for the benefit and security of this defendant a trust deed conveying all his interest in the lands mentioned in said petition herein for the sum of twenty-five thousand dol-

lars which trust deed was executed, delivered and accepted as and for a complete and continuing security to this defendant for any and all sums of money which he might loan to said I. B. Merriam and as and for a continuing security to this defendant for any liability which he might incur by reason of endorsing notes or other commercial paper for said I. B. Merriam.

That thereafter and on or about the 11th day of April, 1899, said bankrupt executed and delivered to this defendant for the security of defendant another trust deed conveying the same property which was, and was intended to be, continuing security for the benefit of this defendant for any endorsements which he might make for said I. B. Merriam and for any and all sums of money which he might loan him to the amount of $35,000 and interest.

And said deed was thereafter delivered by this defendant to the trustee therein named, in said month of April, 1899.

That this defendant loaned to and endorsed for said I. B. Merriam from time to time to the amount of $55,000.

That said I. B. Merriam had endeavored repeatedly to sell said coal lands, but without success. That during or about the month of December, 1902, defendant entered into an agreement with said I. B. Merriam, by the terms of which this defendant was to enter into possession of said premises and negotiate a sale of the same if possible, and out of the proceeds of said sale, first pay himself the amount due for money loaned and take up such paper as

he was liable on as endorser and for all of which he was secured by the trust deed aforesaid.

That in pursuance of said arrangement this defendant made a sale of said premises, took title thereto from said I. B. Merriam and out of the purchase price of $65,000 paid the debt to him, this defendant, and notes on which he was accommodation endorser in bank of Syracuse to the amount in all of $42,000, or thereabouts, and paid over to said I. B. Merriam in cash the sum of $25,032, or thereabouts. That after said transaction was completed, defendant was informed by his said brother, I. B. Merriam, that he was not going to have sufficient money to pay all of his debts and the defendant inquired of his said brother as to the amount he would require in addition and was told that he would require ten thousand dollars, and that with said sum he could pay all his creditors and would be in comfortable circumstances and could keep his Chattanooga real estate. That thereupon this defendant loaned to said I. B. Merriam the sum of ten thousand dollars in addition to the $25,032.00 which he had turned over to him out of the proceeds of said property.

Further answering the petition and bill of complaint herein this defendant affirmatively alleges that prior to the filing of the petition in bankruptcy herein he had no knowledge of the insolvency of said I. B. Merriam and had no reasonable cause to believe, and in fact did not believe or suspect that said I. B. Merriam was insolvent or not able to pay his just debts in full. That for the lands referred to in the petition herein this defendant paid a

full, fair present consideration and obtained no unlawful preference over the other creditors of said I. B. Merriam and never sought to obtain any such unlawful preference. That the lands to which this defendant so took title were lands upon which this defendant had perfect security and a valid lien under and by virtue of the trust deeds hereinbefore referred to and as to which lands no other creditors had or could acquire any lien or title whatever."

In the foregoing answer, which was filed August 1, 1903, it is averred that at the time Thomas Merriam bought the interest of his brother in the coal land it was encumbered by two deeds of trust as follows: One for $4000.00 in favor of the First National Bank, of unknown date, and the other for $35,000 in favor of Thomas Merriam, dated and delivered April 11, 1899. The answer avers further in stating the history of the dealings between Thomas Merriam and I. B. Merriam that in the summer of 1897 the debts of the former amounted to $25,000, and that a deed of trust to secure this sum was then executed; that the indebtedness had been increased to $35,000 by April 11, 1899, when the deed of trust was executed to secure that amount.

After the testimony in the cause had been taken and it was ready to be submitted for final hearing, to wit, on May 27, 1904, E. J. Page, one of defendant's attorneys filed an affidavit stating that he had drafted the answer of the defendant from a personal conference had with him after the note for $35,000 had been delivered up to I. B. Merriam, and after this note and the deed of trust securing its payment had been filed by I. B. Merriam with the

Referee in Bankruptcy at a meeting of his creditors; that at the time affiant interviewed Thomas Merriam he was in a delicate state of health, and the conference was not as thorough as it would have been had an answer under oath been required. Affiant understood that the note and deed of trust were executed and delivered on or about April, 1899, whereas the evidence showed that they were both executed on September 24, 1897, and that the note was then delivered; but that the deed of trust was not in fact delivered until 1899 when Thomas Merriam was on a visit to his brother in Chattanooga, Tennessee.

Affiant also stated his mistake in averring that a previous deed of trust to secure $25,000 of this indebtedness had been executed in the summer of 1897. (Rec. p. 254).

It was also shown by the affidavit of Frank Spurlock, another of defendant's attorneys, that he was present when the note and deed of trust, both dated September 24, 1897, were filed at a meeting of the creditors of I. B. Merriam, and had also been present at the time the depositions of I. B. and Thomas Merriam were taken, and he had never noticed the discrepancy between the date of the note and deed of trust, as stated in the answer, and the actual date of the papers as proven by these witnesses. (Rec. pp. 255-6).

From these affidavits the Court permitted an amendment of the answer on May 27, 1904, so as to aver that the note for $35,000 and the deed of trust securing it were both executed and dated September 24, 1897, and that no previous deed of trust had been executed securing any part of this indebtedness. In the same order,

Thomas Merriman being then dead, his executors were made defendants. (Rec. p. 266).

The plaintiff filed no special replication either to the original or to the amended answer; and he filed no amended bill impeaching in any manner the *bona fides* of the mortgage set up in the answer or presenting any issue concerning its execution and non-registration.

After proof taken concerning the financial condition of I. B. Merriam for five or six years prior to his bankruptcy the execution of the deed of trust of September 24, 1897, to secure Thomas Merriam in the sum of $35,000 and its non-registration; and the indulgence received by I. B. Merriam from his creditors on account of promises made by him to pay other debts out of the proceeds of a sale of the coal lands whenever made, and other testimony to be hereafter stated, the District Court on final hearing July 19, 1904, decreed as follows:

(1) That at the time of the sale and conveyance of the coal land to Thomas Merriam the bankrupt, I. B. Merriam, was, and had been for several years, insolvent; and that this insolvency was known to Thomas Merriam, the defendant.

(2) That the appropriation of the proceeds of this sale to the payment of debts due to the defendant, and those upon which he was accommodation endorser, constituted an unlawful preference on account of which the Trustee had a right to recover whatever amount was necessary to pay off the bankrupt's creditors.

(3) That the unrecorded mortgage securing $35,000 of the indebtedness set aside out of the proceeds of said sale did not constitute a valid lien because, the burden of proof being on him, the defendant had failed to show that it was intended to operate as a valid and continuing lien, and that it was fraudulently withheld from registration or with the intent to injure other creditors.

The case was, for the reasons stated, referred to a Special Master to report the amount of all debts, proven or provable against the bankrupt, to ascertain the amount which the executors of Thomas Merriam should pay into Court. (Rec. p. 258).

On this reference the defendants offered to prove that a number of creditors living at Chattanooga had received payments within four months prior to the bankruptcy, and could not therefore prove the balance of their debts; but this was rejected on the ground that the Trustee in this respect did not represent the creditors. (Rec. p. 269).

The Referee reported that the total claims proven against the bankrupt amounted to $45,443.23. (Rec. pp. 271-2).

This list, as an inspection will show, includes the following debts: $2697.52 to Mrs. S. O. Vann; $9250.00 to A. D. Story; $2513.89 to F. F. Weilh; $5730.98 to J. L. Brown Banking Co.; $3216.11 to Gus Cate; all these being old debts dating back to 1896. Debts amounting to $10,006.45 due to the First National Bank; debts amounting to $1528.69 due to members of the family of

I. B. Merriam. The balance of the list consists nearly altogether of accounts for merchandise sold to Merriam & Son.

The report of the Special Master was confirmed and a decree entered on September 22, 1904, requiring the executors to pay into Court $45,443.23, the total amount of the debts included in the list. (Rec. p. 273).

From this decree both parties appealed to the Circuit Court of Appeals of the Sixth Circuit.

The plaintiff assigned error because the District Court did not require the defendant to pay into Court the full sum of $60,000 which the evidence showed had been applied in payment of debts due to, or endorsed by, Thomas Merriam. (Rec. p. 279).

The defendant assigned error because:

(1) The evidence failed to show that I. B. Merriam was insolvent within the meaning of the bankruptcy law of 1898, or knew that he was insolvent and intended to prefer Thomas Merriam in appropriating the proceeds of the land sold to the payment of debts due to or endorsed by him.

(2) The evidence failed to show that Thomas Merriam knew that I. B. Merriam was insolvent or contemplated bankruptcy at the time the proceeds of said sale were appropriated for his benefit, or that he had reasonable cause to believe that the bankrupt intended to prefer him over his other creditors.

(3) The evidence showed that Thomas Merriam, on November 15, 1902, more than six months before the petition in bankruptcy was filed, agreed in writing to purchase and take the lands bought from the bankrupt to effect a payment of said debts, and therefore had the legal right, when the conveyance was made on June 1, 1903, in accordance with said contract of sale, to accept said conveyance on payment of the balance due to I. B. Merriam after deducting the debts.

(4) That the mortgage securing $35,000 of said indebtedness being valid as between the parties without registration was valid as against the Trustee because at the time of its payment no creditor of the bankrupt had fixed a lien on the land by any legal proceeding. (Rec. p. 274).

The Circuit Court of Appeals overruled the defendants' assignment of errors but modified the decree so as to require the defendants to pay in such sum as might "be necessary for the payment of all debts of every class which have been or may be proven against the bankrupt *and the expenses of the Trustee, his fees and the cost of the bankrupt cause.*" (Rec. pp. 291, 280).

The case having been remanded to ascertain the debts, cost and fees, a decree was entered on the mandate in the District Court referring the cause to a Special Master to hear proof and report.

1. A list of the claims of every character which have been or may be proved against the bankrupt, their nature, amounts and the aggregate.

2. The amount of the expenses and fees of the trustee.

3. The costs in the bankrupt cause.

4. The amount of the reasonable compensation of Williams & Lancaster and Pritchard & Sizer, as attorneys for the trustee, including their services in this case. (Rec. p. 321).

REPORT OF THE SPECIAL MASTER.

The debts reported by the Special Master under this reference with interest, calculated up to the date when it was made, amounted to $60,394.94. The list included the same debts previously reported with an additional indebtedness in favor of the First National Bank amounting to $7376.96 and $300.00 due to A. W. Chambliss.

The expenses of the trustee as reported included his compensation of $756.27, the Referee's compensation amounting to $603.94, and the expenses of the Receiver amounting to $1,232.90.

The fees reported in favor of the trustee's counsel was twenty-five per cent. of the recovery in this cause, that is $15,098.73.

The total of the debts, expenses and fees, not including the costs of this cause, was $78,086.78.

EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER.

The defendants filed a number of exceptions to this report, the substance of which was as follows: To the partnership debts reported as provable against the bankrupt and entitled to payment out of the proceeds of the land sale.

By the terms of the reference the Master was required to report all claims, their nature and amount, but on objection made by plaintiff's counsel he refused to take evidence showing the debts that were liabilities of the firm of Merriam & Son. But the list of the debts having been compiled from the proof of claims on file these proofs were, by stipulation, made a part of the proof, and from them the nature of many of the claims appears. (Rec. pp. 331, 354).

The defendants excepted to the entire report because it failed to show the nature of the liabilities included, that is, whether they were debts of I. B. Merriam individually, or debts upon which he was liable as a member of the firm of Merriam & Son.

They also excepted to the allowance as against them of all of the claims for goods sold and delivered to Merriam & Son shortly before the bankruptcy of I. B. Merriam. A list of these claims is referred to in the exceptions filed.

The defendants by these exceptions insisted that the debts of Merriam & Son should not be included in the

judgment against them because the debts of Thomas Merriam which were paid out of the sale of I. B. Merriam's coal lands had priority over his partnership debts. (Rec. pp. 345, 351).

The second class of exceptions related to certain ones of the individual debts included in the report.

The Debts of the First National Bank. The claims of this bank as reported amounted to $18,990.00. The defendants excepted to the allowance of this claim because the evidence in the case showed that T. G. Montague, the president of the bank, knew of the mortgage in favor of Thomas Merriam and had held $10,000.00 of the debts secured by it. (Testimony of I. B. Merriam, Rec. pp. 75, 144; T. G. Montague, Rec. p. 179, both witnesses for plaintiff.)

On June 2, 1903, I. B. Merriam paid to this bank several notes amounting to over $14,000. (Rec. p. 312).

The Debts of the J. L. Brown Banking Company. This debt, with interest, amounted to $6363.69. The officials of this bank were closely related by marriage to I. B. Merriam and were informed of the fact at the time I. B. Merriam executed the mortgage to Thomas Merriam, and had never, in any manner, questioned the validity of the lien created by said mortgage. (Rec. pp. 154, 88, 101).

The Debts of I. B. Merriam's Sons. These debts, which were also excepted to, were as follows: To Thomas N. Merriam $1,492.66, salary as salesman of Merriam &

Son. To I. B. Merriam, Jr., $291.14, salary as salesman of the firm. Thomas N. Merriam was the Trustee named in the $35,000 mortgage, and the evidence shows, without dispute, that all the family of I. B. Merriam knew of the existence of that mortgage. These debts are also excepted to because liabilities of the firm of Merriam & Son. (Rec. p. 352).

The third exception relates to the fees allowed the trustee's attorneys.

These fees were excepted to: (1) because they were excessive; (2) because there was no provision of the bankrupt law authorizing them, or any part of them, to be taxed and included in the judgment against the defendants. (Rec. p. 352).

All these exceptions were overruled and the report was confirmed. A decree was thereupon entered requiring the defendants to pay into Court the sum of $70,891.54, the total amount, with interest, retained by Thomas Merriam out of the price of the coal lands. (Rec. p. 353).

From this decree the defendants again appealed to the Circuit Court of Appeals, and the cause having there been heard on the defendants' assignment of errors, the District Court was affirmed by a decree entered December 15, 1906. (Rec. p. 367). From this decree and the former orders in the cause defendants appealed to this Court, having assigned with their petition for appeal the following errors upon which they now rely for a reversal of said decree.

I.

The Court erred in finding that I. B. Merriam, the bankrupt, was insolvent when on June 1, 1903, he conveyed his lands to appellant's testator for the purpose of settling the debts then due from him to appellant's testator and upon which the said testator was endorser, because said finding was reached by including and estimating with the debts which the said bankrupt owed individually, the debts which were owed by Merriam & Son, the firm of which said bankrupt was a member, and over which debts appellant's testator as an individual creditor had a right of priority of payment.

II.

In finding that Thomas Merriam, appellant's testator, when his debts and those upon which he was endorser were settled, as aforesaid, had reasonable cause to believe that the said bankrupt was insolvent and intended to prefer him as a creditor: (1) Because there is no evidence to support said finding; (2) because it was necessary, in reaching this conclusion, to impute to appellant's testator, as the Court expressly did, the knowledge of the facts that he could have acquired by an investigation of the bankrupt's financial condition; and (3) because, as the record now stands, this inquiry would not have revealed whether the bankrupt was or not insolvent counting only his individual debts, or those in the same class with debts due to appellant's testator.

III.

The Court erred in holding that appellant's testator received a voidable preference in retaining out of the price he contracted to pay to I. B. Merriam for said lands, all debts due to him from the said I. B. Merriam and for which he was liable as endorser.

Wherefore appellant's testator as vendee had the legal right, when said sale was consummated by conveyance on June 1, 1903, to discharge the purchase price by a cancellation and surrender of the debts due to him from his vendor.

IV.

Because the evidence shows that at the time of said sale and the appropriation of the proceeds thereof, thirty-five thousand ($35,000) dollars of the indebtedness due from I. B. Merriam to Thomas Merriam was secured by a mortgage or deed of trust on said lands executed September 24, 1897, and delivered to the mortgagee, and which, although not recorded, was good under the laws of Tennessee as between parties thereto; and at the time said mortgage debt was paid by the sale aforesaid, no creditor of I. B. Merriam had fixed a lien upon said land by attachment, execution or other legal proceeding. To the extent of said mortgage debt, the appropriation of the proceeds of said sale was, therefore, in satisfaction of a valid lien created more than four months before the filing of the petition in bankruptcy.

V.

The Court erred in finding that said mortgage was not executed in good faith and was void for fraud: (1) Because there is no evidence in the record to support said finding, and (2) because no such issue was presented by the pleadings.

VI.

In holding that appellants as individual creditors of the bankrupt whose debts were paid out of individual property were liable to appellee not only for the entire amount of the individual debts of the bankrupt, but for the entire amount of the partnership debts of Merriam & Son also.

VII.

In holding and adjudging that appellants were liable, in addition to the entire amount of the individual and partnership debts of the bankrupt, for the fees of counsel of appellee amounting to $15,000. (Rec. p. 369).

BRIEF AND ARGUMENT.

(1) *Was I. B. Merriam, the bankrupt, insolvent when he conveyed his coal lands to Thomas Merriam for the purpose of settling the debts due to and endorsed by the latter?* (2) *Was the effect of the transfer to enable Thomas Merriam to obtain a greater percentage of his debts than any other creditor of the same class?* (3) *Did Thomas Merriam know that I. B. Merriam was in-*

solvent and have reasonable cause to believe that I. B. Merriam intended by the transfer to give him a preference? (4) *Was the appropriation of the proceeds of the land sale for the payment of the debts of Thomas Merriam within four months before the filing of the petition in bankruptcy?*

These questions cover several of the errors assigned by the appellants. They involve questions of fact that have been determined against the appellants by the two lower courts. In asking this court to reconsider them we recognize the rule "that when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it be clear that their conclusion was erroneous." Baker vs. Cummings, 169 U. S., 198. Or unless it appears that in reaching the conclusion some obvious error has intervened in the application of the law or some serious mistake made in the consideration of the evidence. Barrett vs. Denison, 145 U. S., 132, 134.

On the questions now being considered the conclusions of Judge Clark, the District Judge, were that I. B. Merriam was insolvent at the time of ,and for several years before, his settlement with his brother, and that the latter knew of his insolvency.

These conclusions are stated in the most general terms and no evidence is cited in support of them except the fact that Thomas Merriam on the final settlement insisted on the payment of his debts and of those upon which he was endorser out of the amount he had agreed to pay for I. B. Merriam's interest in the lands conveyed to him.

It was said that this stand taken by Thomas Merriam at the time of the settlement could not "be reconciled at all with the view that he did not understand that his brother was at that time hopelessly insolvent." (Rec. p. 259).

In regard to both the vendor and vendee he held "as a matter of law" that every man is conclusively chargeable "with such knowledge and belief as a reasonably sensible and prudent man ought to know under the given circumstances of the case," and that under the circumstances of this case the vendee could not fail to know that the vendor was insolvent. In other words, in Judge Clark's opinion, the evidence before him clearly showed that I. B. Merriam was insolvent, and both he and Thomas Merriam ought to have known it and were therefore chargeable with knowledge of it. (Rec. p. 259).

It was also held "as a matter of law" that both parties contemplated whatever was the natural consequence of their acts, and that therefore the appropriation of the proceeds of the land sold to the payment of Thomas Merriam's debts constituted an unlawful preference. (Rec. p. 260).

The Circuit Court of Appeals after reciting the facts that Thomas Merriam agreed to pay his brother for the coal lands $65,000 in cash and $20,000 in the stock of the company to which the land was conveyed; that this stock was pledged as collateral to raise an additional sum of $10,000; that it was necessary to use $7,400 of the purchase money in clearing off prior liens about which no question was made, and that from the balance of the purchase money then left there was deducted the sum neces-

sary to pay the debts due directly to Thomas Merriam and notes endorsed by him at a bank in Syracuse, all of which amounted to $44,000; that the balance of the purchase money then remaining was turned over to I. B. Merriam to be applied, so far as necessary, to the payment of debts at Chattanooga endorsed by Thomas Merriam; that after these were paid there was but little left, not exceeding $10,000, to be applied to the payment of other creditors of I. B. Merriam, said:

"At the time of this transfer and appropriation I. B. Merriam was hopelessly insolvent *and within ten days he filed his voluntary petition to be adjudicated a bankrupt and was so adjudged.*

His assets consisted of a number of parcels of real estate situated in Chattanooga, all mortgaged for their full value or more and a remnant of a stock of merchandise belonging to the firm of I. B. Merriam & Son, appraised at $1,800.00. The debts of I. B. Merriam individually and of I. B. Merriam & Son excluding debts due to Thos. Merriam, or secured by him, and wholly unsecured, aggregate approximately $50,000.00 with no assets to apply to their payment if the purchase price of this coal land be excluded.

It is therefore evident that when I. B. Merriam agreed to apply the proceeds of the sale of this land in exoneration of Thos. Merriam as his surety and in payment of the alleged indebtedness to him that he was hopelessly insolvent and could not but know that such was the case.

Neither was this a recent condition for the evidence satisfactorily shows that for several years he had been in failing circumstances and that his creditors were held off only by the apparently unincumbered condition of his coal lands and the constant promise that he was about to dispose of them for a price which would pay all of his debts and disencumber his Chattanooga property." (Rec. pp. 282, 283).

We contend that both the lower courts erred in the following respects:

1. In holding that I. B. Merriam was insolvent at the time he had agreed to pay the debts of Thomas Merriam out of the proceeds of the land sale even if this agreement be treated as made June 1, 1903, because there was no evidence that at that time the aggregate value of his assets was not equal to the total amount of his debts.

There was evidence that the property as appraised and administered in the bankruptcy proceeding was not sufficient to pay all the debts scheduled, including the debts of Merriam & Son. This appeared from the testimony of H. F. Rogers, the appellant, in which he showed from the records the total amount of the indebtedness as scheduled, the property scheduled and its value as appraised, and the amount realized from forced sales made of same prior to the time his deposition was taken. (Rec. p. 24).

In addition to this evidence a number of witnesses were examined who state that I. B. Merriam or Merriam & Son did not have good credit and were slow in their

payments during the last two or three years before the bankruptcy, although there was a popular idea that I. B. Merriam was a man of large estate. The decadence of his credit in the last years was, in the estimation of the witnesses examined, largely due to the slowness of his payments and the gradual dwindling of the stock of groceries kept by Merriam & Son. These are the two prominent facts brought out in the testimony of these witnesses.

None of them professed to know what property was owned by I. B. Merriam at the time in question, and of course did not undertake to make an estimate of its aggregate value. (H. B. Case, Rec. p. 26; Ernest Scholze, Rec. p. 44; R. T. Wright, Rec. p. 31; Chas. A. Lyerly, Rec. p. 20; W. A. Sadd, Rec. p. 195).

T. G. Montague, the president of the First National Bank, at which I. B. Merriam always did his banking business, says that for three or four years it was difficult for the firm of Merriam & Son to meet their daily obligations and that they were constantly asking for favors. He further states that leaving out of consideration the coal lands sold to Thomas Merriam, I. B. Merriam was insolvent. (Rec. p. 199).

But it appears that his bank continued to discount the paper for Merriam & Son up to about the time that I. B. Merriam filed his petition in bankruptcy. (Rec. p. 202).

Under the Bankruptcy Act of 1898 the true test of insolvency was whether the aggregate of all the property

owned by the debtor at the time of the payment, excepting only such as had been conveyed to hinder and delay creditors, was equal in value to the total amount of debts owed by him. Vacaro vs. Security Bank, 103 F. R., 433; *In re* Boscher, 120 F. R., 414; Lansing Boiler & E. Works vs. Ryerson & Son, 128 F. R., 702.

According to this test there was no evidence of I. B. Merriam's insolvency in this case. The theory of the plaintiff below was that the coal property had been transferred to hinder and delay creditors, and was therefore to be excluded in all testimony concerning the debtor's insolvency. And the appraisements made in the bankruptcy proceedings did not include this property, and was therefore not only an *ex parte* proceeding, but a partial estimate.

There is no presumption of insolvency at a prior date from the fact that the property as administered brought less than the debts. (*In re* Chappell, 113 Fed., 545; Acme Food Co. vs. Meier, 153 Fed., 77). The fair valuation is not to be determined by the situation of the debtor, or his inability to make an immediate sale of his property for enough to pay all his debts. (Duncan vs. Landis, 106 Fed. Rep., 858). Nor by the sum to which the sale value is reduced by the levy of an execution. (Chicago Title & Trust Co. vs. Roebling's Sons Co., 107 Fed. Rep., 71).

Insolvency is to be determined by a fair valuation of the debtor's property and not by its market value or its

sale value, especially at a public or judicial sale. The debtor has the right to have each piece of his property valued, and if the aggregate valuation equals his indebtedness he is not insolvent. Was this right recognized in this case? If the appraisement of the property scheduled in the bankruptcy proceedings is equivalent to such proof, then there was a valuation to that extent.

The burden was on the appellee to show by witnesses examined in the usual manner that I. B. Merriam was insolvent at the time of the alleged preference, and this insolvency cannot be inferred from *ex parte* appraisements or from the fact that the property as administered in the bankruptcy proceedings left debts unpaid. It might be that ten days before his petition was filed I. B. Merriam was insolvent, but the burden of proof was on the appellee to show this fact in this litigation. So it might be inferred from the developments of the bankruptcy proceeding that he was at the time stated insolvent; but if that fact could be inferred in this case it could in all others so that creditors by *ex parte* appraisements and forced sales would always have it in their power to dispense with the requisite proof of this essential fact in suits to recover preferences.

The lower courts made no distinction whatever between the insolvency of I. B. Merriam as an individual and the insolvency of the firm of which he was a member. The debts of the firm were scheduled and constitute a large per cent of the unpaid liabilities. Whether I. B. Merriam was insolvent in such sense that he could not pay an individual creditor by the transfer of individual

assets without being guilty of a voidable preference would necessarily depend on the further question whether or not the aggregate of his individual property was equal to the total amount of his individual debts.

2. The District Judge held that both I. B. Merriam and his brother Thomas, as a matter of law, were presumed from the facts as they appeared in proof to know that I. B. Merriam was insolvent when he agreed to apply the proceeds of the land sale to the payment of the debts he owed his brother; and that the law would further presume, under these circumstances, that I. B. Merriam intended to give a preference, and that Thomas Merriam had reasonable cause to believe that such preference was intended.

The Circuit Court of Appeals held that it was evident that I. B. Merriam knew he was insolvent at that time and that he had been for several years prior thereto because his assets as appraised left unpaid a large amount of debts of his own and of the firm of Merriam & Son. And having thus imputed to him a knowledge of his insolvency the Court said:

"Neither do we see any reason for disagreeing with the court below in respect of its conclusion that Thos. Merriam was aware of his brother's condition at the time he bought the land here involved, or of such suspicious facts as to charge him with inquiry and notice of such facts as he might have learned by an inquiry conducted in good faith. The bankrupt was his brother. For several years he had been supporting his credit both by endorsements and by lending him money." (Rec. p. 283).

In support of this conclusion it is said:

"That his brother's affairs were not prosperous and that his debts were increasing he was bound to know from the nature of his own transactions with him. It is true he did not live at Chattanooga, but he occasionally visited his brother and concedes some degree of knowledge touching other indebtedness of the bankrupt. His deposition in support of his defense has been carefully read. It is neither full nor frank and impresses us with the conviction that he was aware of the precarious condition of his brother's affairs as far back as September, 1897, when he claims to have demanded a mortgage upon his coal land.

That he should agree not to record the instrument then taken until he should deem it necessary for his own protection is significant of his knowledge of his brother's condition and of the effect upon his credit if recorded.

The very fact that after carrying his brother for years he should demand the immediate payment of his entire debt out of the proceeds of the sale of this land and his exoneration from liability as surety by payment of every debt upon which he was bound, admits of but one explanation in the light of this evidence, and that is that he knew his brother was insolvent and that if he was not thus preferred he would lose a large part of his debt." (Rec. pp. 283, 284).

It was an error of law for the lower courts to impute to I. B. Merriam a knowledge of his insolvency and an intent to prefer; and in doing so both courts wholly ignored his testimony as a witness for appellee in which

he deposed to facts totally at variance with the court's conclusion.

From the testimony of I. B. Merriam as a witness of appellee we have a full history of his dealings with his brother, of the circumstances which led to the sale of his coal lands and of the payment of his brother's debts out of the proceeds of this sale. He was the principal witness introduced in behalf of appellee who could not, therefore, for reasons of public policy, impeach his veracity. Dravo vs. Fabel, 132 U. S., 489; Jacobs vs. Van Sickles, 127 Fed. Rep., 62.

Previous to I. B. Merriam's examination by appellee as a witness in this case he had deposed at length before meetings of his creditors and the deposition so given was by the appellee made an exhibit to, and a part of, the deposition taken in this case. (Rec. pp. 46, 93, 111).

As such witness he says:

He was in the wholesale grocery business in Chattanooga continuously from the year 1879 up to about June 1, 1903. In 1896 he bought out his then partner, A. D. Story, paying a part of the consideration in cash and executing to Story his notes for $12,000 of which there was a balance due of $9,250 at the time the petition in bankruptcy was filed. In 1896 he also owed Mrs. S. O Vann $7000; Gus Cates, $3,650; Fred Weihl, $2,100; F. M. Reeves, $2,100; The J. L. Brown Banking Co., $5000, and probably others besides these. (Rec. p. 101).

All these debts, or balances thereon, appeared in the

list of unsecured debts and constitute the larger part of the sum which appellants were required to pay into court by the final decrees rendered in this cause. (Rec. pp. 270, 333).

In 1896, and from then on, he was doing his banking business at the First National Bank of Chattanooga, and was largely indebted to that concern which also at the time of his failure held debts against him amounting to $18,990.

During the activity in the real estate market in 1889 he bought a large amount of real estate in and around Chattanooga at a cost to him of $100,000—the same real estate which was appraised in the bankruptcy proceeding at $40,000. (Rec. p. 137).

About the same time he and one G. H. Jarnagin jointly purchased 10,000 acres of coal land in Cumberland County, Tennessee, in the mountainous regions of Tennessee and some distance from Chattanooga. The prices of real estate fell considerably about 1893, and from that time to the return of the present conditions of prosperity it was difficult to dispose of the same at former prices. He held on to all the land bought in and around Chattanooga and owned the same at the time of his failure, the most, if not all, of it having been mortgaged to secure some of the old debts already enumerated.

When the firm of Merriam & Story was dissolved in 1896 it was succeeded by the firm of Merriam & Son.

The new partner was Frank Merriam, then twenty-two years of age, and on going into business with his father he was without capital but was guaranteed and received a certain amount as salary. This firm was not dissolved until about the first of June, 1903. (Rec. pp. 53, 124).

Thomas N. Merriam and I. B. Merriam, Jr., two other sons of the bankrupt, were salesmen for the firm of Merriam & Son, and accounts in favor of each for salary constituted a part of the judgment against appellants. The claims scheduled by witness included a large list of debts for goods and merchandise sold to this firm which, together with the old debts already enumerated, constitute the judgment rendered against appellants by the final decree. The firm did an annual business of about $50,000 a year until the last year before witness' bankruptcy. It had good credit until the last year or two before the failure. The witness' statement of the standing of this firm is confirmed by the fact that it continued to carry, up to within a short time of the bankruptcy, a statement in Dun's Mercantile reports showing assets amounting to $51,000 and liabilities of $37,000, and showing in the same statement that I. B. Merriam's individual property was worth $163,750 as against individual debts amounting to $39,500. (Rec. pp. 226, 230, 231).

Witness further says that Thomas Merriam, who was sixty years of age, was in business at Syracuse, New York, and estimated to be worth from $250,000 to $300,000. He commenced borrowing from this brother

in 1893 or 1894, and these loans in the spring of 1897 amounted to $25,000. At this time Thomas Merriam was in Chattanooga and witness requested of him a further loan of $10,000. It does not appear from his testimony what he then represented to be his financial condition, but the additional loan of $10,000 was made before the 24th day of September, 1897, when a note was executed to Thomas Merriam for $35,000 which was intended to represent the amount then due, in direct loans made by him and notes which had been endorsed and to stand for the renewals which might thereafter me made of these debts. On the same day witness, I. B. Merriam, and his wife executed and acknowledged a mortgage conveying the witness' interest in the coal lands to secure the $35,000 note. At this time Thomas Merriam was at his home in Syracuse and the note was mailed to him, but the mortgage was not then delivered. It was not delivered until April, 1899, when Thomas Merriam was again in Chattanooga on his way home from Florida. It was then delivered to him and turned over by him to Thomas N. Merriam who was named as the Trustee therein. (Rec. pp. 111, 116, 122, 136).

The witness says that in April, 1899, he represented to his brother that he owed between $85,000 and $100,000, including the debts due to his brother, also the debts of the firm and all others of every description. (Rec. pp. 68, 95). At the same time he estimated his real estate to be worth $150,000 and the value of his interest in the grocery business at $35,000. (Rec. p. 95).

Subsequent to this time Thomas Merriam made addi-

tional loans to witness and endorsed other notes for him —the entire indebtedness, including endorsements, amounting in the summer of 1902 to about $60,000.

He says that his brother knew that he was pressed for money from the fact that he frequently called on him for loans and endorsements and drew on him whenever he needed money. (Rec. pp. 68-9). But that his brother had never asked him during their dealings much about his condition, and knew only in a general manner about the real estate he owned in Chattanooga, and that he owed in 1899 between $85,000 and $100,000. (Rec. p. 133). He states in his testimony, over and over again, that he thought all along that he was solvent, and that the value of his property exceeded all of his liabilities of every kind, and was worth much more than the value as appraised in the bankruptcy case. In this connection he says that the twenty-seven lots upon which Mrs. S. O. Vann had a mortgage to secure her debt of $6,000 had cost him $15,000. (Rec. p. 137). The creditors directed the representative of Mrs. Vann to sell under her deed of trust (Rec. p. 104) which she did, and after bidding in the property reported balance due on her debt of $2691.07. (Rec. pp. 102, 105, 118, 119, 142). He represented to his home creditors that he was worth two dollars for every one that he owed. (Rec. pp. 78, 95).

From the time that he executed the mortgage to secure his brother in the sum of $35,000 he was endeavoring to effect a sale of his coal lands, and from that time on his brother was expecting that whenever that land was sold

his debts would be paid, and his brother knew he could not pay these debts without making that sale.

He is called upon to testify, and does state repeatedly, that his brother had never at any time declined any of his requests for financial aid, and had never called upon him for a settlement of any portion of the indebtedness until during the summer of 1902 at which time his brother was stricken with the illness which later caused his death. He was then operated on either for appendicitis or cancer of the stomach, and was ever afterwards in delicate health. (Rec. pp. 82, 83, 130).

After recovering from this operation Thomas Merriam gave notice that it was his desire to have a settlement and to be relieved on account of his endorsements. One of the many negotiations for the sale of the coal lands was then pending, and Thomas Merriam wrote that unless a sale was made before November of 1902 he would take the option then outsanding and sell the land for the purpose of securing the settlement which he desired. (Rec. p. 130). Consequently on the 15th of November, 1902, he and one W. Herbert Robinson went to Chattanooga and there entered into a written contract to purchase the interest of I. B. Merriam and G. H. Jarnagin in the coal property for $150,000 in cash, or $125,000 cash and $40,000 in the capital stock of the corporation to be organized for the purpose of developing the land. (Rec. p. 19).

Thomas Merriam made this purchase with the understanding and agreement that his debts and those upon

which he was liable as endorser would be paid out of the purchase price for witness' half interest in the lands. (Rec. pp. 99, 117, 130, 134).

After this agreement was signed Thomas Merriam made several trips to Chattanooga with the parties to whom the land was to be conveyed by him for the purpose of inspecting the land and the prospects for its successful development. Finally the sale was consummated by conveyance which was made about June 1, 1903. When the deed was ready to be delivered witness, I. B. Merriam, went to Syracuse, N. Y., for the purpose of having the settlement with his brother in accordance with their prior agreement.

There had been no secrecy about the contract for the sale of the coal lands made in November, 1902. It was drawn by Pritchard & Sizer, now attorneys for appellee, and it was generally known that the sale was pending. In fact, it appears that a number of creditors were expecting to be paid when the trade was closed. There is no evidence that Thomas Merriam knew this or ever discussed the pending deal with any of his brother's creditors, or that any of them ever made themselves known to him.

Thomas Merriam was examined in his own behalf and corroborated I. B. Merriam in his statement as to loans of money and credit made to him, the execution of the note for $35,000 on the 24th day of September, 1897, and of the mortgage on the coal lands executed at the same time to secure the note, and the loans made subse-

quent to the execution of the mortgage. He also says that from a time prior to the execution of the mortgage, and continuously up to the time he agreed to buy this land in November, 1902, I. B. Merriam was making efforts to sell this property; that he agreed not to record the mortgage in his favor because his brother had represented that he and his co-tenant thought it would affect their chances of selling the property, and because he was advised that under the laws of Tennessee the mortgage was good without registration, and that it was not necessary to register as there were no other large creditors besides himself. (Rec. pp. 153-4).

He further says that in 1897 and 1899 I. B. Merriam represented to him when making applications for loans that he was worth $170,000 and owed not exceeding $40,000. He then claimed to own real estate worth over $100,000 over and above encumbrances. (Rec. p. 152).

This statement accords with that carried by I. B. Merriam in Dun's Mercantile Agency which was made in the year 1900 and not withdrawn from publication until about June, 1903. (Rec. p. 231).

Thomas Merriam says that he was not in Chattanooga again until November, 1902, when he entered into the contract to buy the lands upon which he held the mortgage. He was asked if he had in the meantime received any information to change his opinion of his brother's financial condition, and his answer was as follows:

"Nothing particular. I never had received any state-

ment from him showing that his financial condition wasn't equally as good as it had been, but I suggested to him that I didn't think he was making any money in the store and he said he hadn't capital enough to make any money in the store, and I told him that he better close up, and he said no, as soon as he sold his coal lands there and some of his other property he would have plenty of capital. He claimed that he never lost any money, that most of the time he had made some; that his taxes and expenses were pretty heavy, carrying so much property, and that it was taking all that he made in the store to pay expenses." (Rec. p. 158).

At the time he closed the trade for this property he says that he knew that his brother owed his half of two prior liens amounting to $14,600; that he owed Mrs. Vann some amount, and that he owed his sister, that is The Brown Banking Company, $5000.00. He knew also that there were other debts at Chattanooga upon which he was endorser, but he had not kept an account of all of them and did not know the full extent of his liability on this account. (Rec. pp. 159, 160, 162, 176).

This was the extent of his knowledge at the time he contracted to buy the lands upon which he held the mortgage by the written agreement signed on November 15, 1902, and at the time he made the settlement with his brother in Syracuse, N. Y., and delivered up to him the $35,000 note and the other notes held by him and by the Merchants' National Bank at that place.

Concerning the settlement which was made June 1,

1903, between I. B. Merriam and Thomas Merriam at Syracuse, N. Y., when the deed conveying the coal lands was delivered under the contract of sale made November 15, 1902, I. B. Merriam was the only witness introduced by the appellee. As such witness he deposed to the manner in which the purchase price was paid, the deduction therefrom of what he owed his brother as had been previously agreed, and that he then believed he was solvent and had no thought of taking the benefit of the bankrupt law and no intention to prefer his brother over his other creditors. He had agreed in November, 1902, that if his brother would buy the land the mortgage debts and others should be paid out of the proceeds. The first thing that was done in Syracuse was to adjust the dispute concerning the amount to be paid for his half interest in the land. He claimed that he was to receive $75,000 in cash and that he was not to be required to take any part of it in the stock of the corporation. He represented to his brother that it was necessary for him to receive $75,000 from the sale in order to meet all his obligations. This led to some dispute and was finally compromised by Thomas Merriam agreeing to take the stock in pledge for loans secured to the extent of $10,000, thus making the sale realize the sum of $75,000 as I. B. Merriam expected.

I. B. Merriam, as witness for appellee, and when examined before his creditors, says the reason his brother secured for him this additional $10,000 was to enable him to keep his promise to pay some other debts in Chattanooga besides those endorsed by his brother. (Rec. pp.

147). He told his brother "that in order to go on and settle up matters satisfactorily, he would have to have $75,000." (Rec. pp. 98, 147).

He also told his brother that if there was a further extension of credit of ten or fifteen thousand dollars he could settle with all his creditors and hold out his real estate. (Rec. p. 86-7). From the $75,000 Thomas Merriam deducted $23,896.07, the amount due on his direct loans with interest, and $19,477.79, the amount of the notes held by the Merchants' National Bank of Syracuse endorsed by Thomas Merriam. (Rec. pp. 51, 107). The difference, or $31,625.94, was turned over to I. B. Merriam with the understanding that when he returned to Chattanooga he was to pay $7,300, his one-half of the liens that encumbered his title to the lands sold, then the balance was to be used, so far as might be necessary, to take up notes endorsed by Thomas Merriam.

At the time I. B. Merriam made this settlement at Syracuse, he not only did what he had agreed in November of 1902 to do, if his brother would make the purchase, but he swears, and gives his reasons for swearing, that he thought he was solvent, that he expected to go on with his business and finally pay out and save a considerable amount of his property. He did not expect to pay all his creditors in cash, but to pay some, get extensions, and finally dispose of enough property to pay them all. And he says that his brother thought he was solvent and that he would go on with his business. (Rec. pp. 116, 130, 100).

Thomas Merriam says:

"At that time when the settlement was made, my brother after we got the thing figured up he said it figured up a little more than he expected and he had not figured on any debts or anything of that kind and he wasn't going to have enough money to pay off all his debts out of this $65,000, and he wanted me to extend more credit for $10,000 and take the stock as collateral security for the ten thousand. I told him that I didn't want to do that and that I had put so much money into property and I was taking so much stock in this company that I didn't want to do it, but he said he was afraid he wouldn't have enough to pay up his debts in his business unless I did it. I said if that was the case, I hadn't any ready money, how would we carry it. He said that Mr. Montague would be perfectly willing to carry $5,000 for him; he is the president of the First National Bank, and there was a man by the name of Cate, that he didn't want the money, all he wanted was a note as security for one thousand. It seems that I was on a note for one thousand for Cate then, and there was some other party whose name I don't know that he owed $700 to and he didn't want the money, and they would be glad to let him have it if I would go security for it. That made $6,700. I said if you need this, to go on over to the bank and discount your note for $3300.00 for four months if you want to clean up everything when you get home. I said I will discount this note and get you the money, so I went over to the bank and discounted this note for thirty-three hundred. I endorsed a note to the First National Bank of Chattanooga for five thousand dollars for one

year. One for one thousand to Mr. Cate for one year and the seven hundred note was made for one year, making the ten thousand. He says all right, that will fix me all right and I can go home and straighten up everything, save my home and have plenty to run the business in good shape.

Q. Did he say anything about how he proposed to run his business?

A. I said, if you want to carry on your business, you ought to have more money; you ought to have from seventy-five to one hundred thousand dollars in money to carry on your business, to properly discount all your bills. He said that he had been talking with new parties and he thought he could get a good partner that would bring in good capital, and that with what he had ought to carry it on in fine shape." (Rec. p. 161).

He further says that his brother was perfectly satisfied with the settlement as made and that he, himself, had no knowledge that would indicate that his brother was insolvent, or that he could not pay all he owed. He at that time believed that he and his sister, that is the Brown Banking Company, were his brother's principal creditors. (Rec. pp. 162-3). He supposed his brother was getting money from him to pay his other debts and that after these debts were paid he would have property enough to pay the others and have a considerable amount left. (Rec. pp. 178, 179).

Other witnesses at Syracuse heard the representations

there made by I. B. Merriam as to his condition. (Rec. pp. 185, 191).

I. B. Merriam explained exactly what caused him to file his petition so soon after returning home. He was expecting to get extensions on his debts. His firm creditors were willing to extend. But Mrs. Vann's attorney demanded payment or additional security. The Penn Mutual Insurance Company held a mortgage on his store building to secure $13,800. An installment of this debt amounting to $500.00 was in default. Mr. Merriam expected to pay this amount and that the remainder of the debt would be allowed to run to its maturity. But the Insurance Company had declared all its debt due and directed that the property be advertised for sale. (Rec. p. 96). He then for the first time thought of winding up his business and concluded it would be best to do so through a proceeding in bankruptcy.

Now in determining the questions: Whether I. B. Merriam intended to give a preference and whether Thomas Merriam had reasonable cause to believe that a preference was intended, both the lower courts ignored all this testimony—the most of it having been introduced by the appellee himself. And in so doing they committed an error of law, as the same Court of Appeals has since held in *In re* First National Bank of Louisville, 155 Fed. R., 103, where it is said:

"But to make the reception of payment a preference, the creditor must have had reasonable cause to believe that the debtor was intending to give him a preference

over other creditors, and we incline to think, with the Circuit Court of Appeals for the First Circuit (Hardy vs. Gray, 144 Fed., 922, 925, 75 C. C. A., 562), that the reasonable implication of the language is that the debtor himself must have intended the preference. The very word signifies the doing of a thing with a purpose to give an advantage; and the construction which treats the motive of the debtor as indifferent seems artificial and awkward. But it is enough to say that a belief that a debtor is insolvent is a very different thing from a belief that he intends a preference; for it would often, and probably generally, happen that a person, though in fact insolvent, would while continuing his business in the usual way make payments without a thought of disparagement of other creditors and with confidence in his ability to pay them all. And upon like consideration the creditor may share in the confidence of his debtor, and may well suppose that the debtor while paying him his debt in the common course of business is acting without any purpose of giving special favor. Such considerations have often been adverted to by the courts as the basis of decision, and were the principal motive for the amendment of 1903. Grant vs. National Bank, 97 U. S., 80, 24 L. Ed., 971; Stucky vs. Masonic Savings Bank, 108 U. S., 74, 2 Sup. Ct., 219, 27 L. Ed., 640; *In re* Eggert, 102 Fed., 735, 43 C. C. A., 1; Off vs. Hakes, 142 Fed., 364, 73 C. C. A., 464; Hardy vs. Gray, 144 Fed., 922, 75 C. C. A., 562; J. W. Butler Paper Co. vs. Geombel, 143 Fed., 295, 74 C. C. A., 433; Loveland on Bank, (3rd Ed.), Sec. 194c."

This construction by the Circuit Court of Appeals of

the Sixth Circuit of Section 60b of the Bankrupt Act of 1898 is the one supported by the great weight of authority, but is not the rule applied by that Court in the decision of this case.

On the contrary, both the lower courts applied the principles declared in Toof vs. Martin, 13 Wall., 40; Wagner vs. Hall., 16 Wall., 602, and other early cases construing the Act of 1867 to the effect: That debtors were insolvent who could not meet their obligations as they matured, and that a transfer by such debtor of a portion of his property to one creditor without making provision for an equal distribution to other creditors would necessarily operate as a preference to him and be taken as conclusive evidence that a preference was intended on the presumption that every man is held to intend the necessary consequences of his act; that creditors were presumed to have reasonable cause to believe that a preference was intended when facts were brought to their attention that would lead prudent men to believe that the debtor could not meet his obligations as they matured; and that the burden was on the debtor and creditor to rebut these presumptions.

When, therefore, it was shown that I. B. Merriam's property, as administered under the directions of creditors for whose use this suit is brought, left unpaid a large amount of debts; and when, in addition to this, it was shown by the proof in this cause that he had not for several years been prompt in meeting his obligations as they matured, it followed, of course, under the rule

last stated, that he was insolvent, and that a preference was necessarily intended by him when he made the transfer to his brother. And when it appeared that Thomas Merriam knew that his brother could not meet his obligations as they matured, and for that very reason had loaned to him his money and credit without limit; and that he also knew that his brother owed some debts besides his own and the ones he had endorsed, the proof of these facts was, under the same rule, sufficient for the presumption that he had reasonable cause to believe that his brother intended to prefer him and to charge him with notice of all that he might have discovered by an honest investigation.

But referring to Toof vs. Martin, and the cases following that decision, Mr. Justice Bradley, speaking for this court in Grant vs. Bank, 97 U. S., 80, said:

"Some confusion exists in the cases as to the meaning of the phrase, "having reasonable cause to believe such a person is insolvent.' *Dicta* are not wanting which assume that it has the same meaning as if it had read, 'having reasonable cause to suspect such a person is insolvent.' But the two phrases are distinct in meaning and effect. It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the

act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances and yet have no cause for a well-grounded belief of the fact.

"Hence the act very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor's insolvency, requires, for that purpose, that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man."

The reasonable belief must have been founded on a knowledge of the facts the creditor had at the time of the alleged preference and not on such as he might have discovered on inquiry. For it is conceded in the opinion in this case that the creditor distrusted the ability of his debtor to bring his affairs to a successful termination, but supposed there was a possibility of his doing so. The knowledge of some suspicious circumstances was necessary to generate this distrust, and yet it was not held that the creditor was put on inquiry and chargeable with the further knowledge that could have been acquired.

In the later case of Barbour vs. Priest, 103 U. S., 294, Mr. Justice Miller said that preference of a creditor was not forbidden by the common law, nor was "it an act forbidden by any general rule of morals or of abstract justice. It was, in fact, a meritorious act aside from the positive rule established by the bankrupt law."

He further said: "It has never been denied, so far as

we are advised, that it is necessary for the assignee of the bankrupt, in attacking such a conveyance, to prove the existence of this reasonable cause of belief of the debtor's insolvency in the mind of the preferred party."

He quoted the rule declared in Grant vs. Bank, *supra*, and said:

"Tested by this rule, which, we think, is the sound one, there is no evidence of any such knowledge brought home to Mrs. Barbour."

In the still later case of Stucky vs. Masonic Savings Bank, 108 U. S., 75, the Supreme Court, through Mr. Justice Miller, said:

"The district judge who decided that he had such reasonable ground, does not seem to have given due weight to the principles of the case of Grant vs. The National Bank, decided by this court, and reported in 97 U. S., 80, a case which was fully considered, and which has since been followed by us as a leading one on the subject.

"That case establishes the doctrine that a creditor dealing with a debtor whom he may suspect to be in failing circumstances, but of which he has no sufficient evidence, may receive payment or security without violating the bankrupt law."

It was not held that the evidence which generated the creditors' suspicions that the debtor was in failing circumstances should have excited inquiries to discover the "sufficient evidence" of insolvency.

These decisions are clearly in accord with the intent of the act; for the words, "shall have had reasonable cause," refer to cause founded on knowledge possessed at the time. If the creditor, at the time of the transfer, has the reasonable cause, inquiry would be useless; if he at the time has not the reasonable cause, it is not made his duty to wait and acquire it by investigation. He stands or falls on what knowledge he possessed at the time of the transfer, and it is importing a new element into the statute to charge him with a knowledge of the "sufficient evidence" which he might have acquired by taking time to make a full investigation of his debtor's financial condition. Such an investigation under the present law would require each creditor, who had cause to suspect that his debtor was in failing circumstances, to estimate and put a fair valuation on each piece of property belonging to the debtor, and to ascertain each item of indebtedness. Under the old law the inquiry would have been simpler, but was not required as held in the cases we have cited.

We do not insist that a creditor can shut his eyes to facts brought to his attention. He has knowledge of such facts without investigation. He has knowledge of what he has deliberately and actively avoided knowing, but it is an entirely different thing to charge him with knowledge for which he must actively search. He must have reasonable cause to believe that his debtor is insolvent. *In re* Pettingill, 135 Fed., 218; Off vs. Hakes, 142 Fed., 364; Butler Paper Co. vs. Goembell, 143 Fed., 296.

But, as this provision of the statute is construed, the

creditor must have had reasonable cause to believe that his debtor *intended* to prefer him, and not a reasonable cause to believe that his debtor was insolvent; for this latter fact is presupposed as essential to the very existence of a preference. The crucial test of a voidable preference, therefore, is the intent or purpose of the debtor to prefer and the creditors' reasonable cause to know of this intent. If the debtor is conclusively presumed to know that he is insolvent, if such is the fact, and is held necessarily to intend the consequences of his act, his intent and good faith of course become immaterial, as the lower courts held. If further there can be imputed to the creditor knowledge that he might acquire by an investigation, and which the court could say was inconsistent with the absence of a reasonable cause to believe that the debtor did not intend to prefer him, then it would only be necessary to consider what were the actual facts. By this system of presumptions and imputations all difference between Sections 60a and 60b is obliterated, and the purpose of Congress, to make the intent of the debtor and the belief of the creditor the characteristics of a voidable preference, is thwarted. But the intent and belief of the parties as shown by their own testimony was held to be material in the three cases last cited. And the effect of such testimony cannot be presumed away.

McNair vs. McIntyre, 113 Fed. Rep., 113;
Jacobs vs. VanSickles, 127 Fed. Rep., 62;
Lansing Boiler & E. Works vs. Ryerson & Son, 128 Fed. Rep., 702;
Turner vs. Fisher, 133 Fed. Rep., 594;
In re C. F. Beckwith Co., 130 Fed. Rep., 475.

An erroneous rule of decision having been applied by the lower courts, causing them to ignore as immaterial the evidence we have cited as to the intent of the debtor and the belief of the creditor, these questions are open, and from the evidence referred to we contend:

(1) That there is no evidence that Thomas Merriam was in fact preferred over other creditors of the same class because there has never been even an attempt to segregate the individual from the partnership liabilities or the individual from the partnership assets.

(2) That the acts of I. B. Merriam in borrowing so largely and continuously from his brother, the long indulgence secured from his creditors while interest was accumulating on other demands, his long, continuous efforts to sell his coal lands, prove the faith he had in his real estate in Chattanooga which he labored so earnestly to save.

It is not conceivable that this man should have carried on this hard struggle for years without a strong hope that he would, in the end, reap some benefit from it for himself. His hope when he left New York, after the settlement with his brother, was that he could get further extensions, carry on his business and finally save his lands. Some of his creditors agreed to extend, but others who had mortgages on his real estate proposed to sell the same at once. His only chance then for further time was the bankruptcy proceeding which he immediately instituted. But his creditors scented larger game and let his real estate go to sale at once. If he meant to

favor his brother he would not have borrowed from him at all, because his financial condition in 1896 and 1897 was, if there was any difference, worse than it was at the time of the sale to his brother. His debts were then more and his lands were worth less. If he had meant to favor his brother he would not have asked him to leave his mortgage unrecorded from 1897 to the time of the sale in 1903 and liable to be subjected at any time to the large indebtedness which all dates as far back as 1896. Nor would he have mortgaged his other lands to his home creditors. Nor, finally, would he have filed his petition in bankruptcy so soon after the settlement was made. Every act of his is consistent with his belief that he was solvent and could save a part at least of what he thought was a valuable estate and if he could have postponed the sale of his lands until the present revival in the demand for real estate it could not be said that his hopes were vain.

(3) Many of these arguments apply with even stronger force in favor of the innocence of Thomas Merriam. Why should he have continued to lend his money and credit to a man whom he knew was hopelessly insolvent? If, as is claimed, he was acquainted with his brother's financial condition, then he knew that in 1896 his brother owed the same list of debts that were unpaid in 1903, and which now constitute the greater portion of the judgment against his estate. And, notwithstanding this knowledge, he loaned to his brother $60,000 without any security except the unregistered mortgage on the lands in Cumberland County which could have been de

feated at any time by levies of attachments or executions sued out by other creditors of his brother. If he had known of these creditors could he have known that they would not take steps to collect their debts out of this land? If he knew of these debts, and of his brother's inability to pay them, then he loaned his money and credit with a most reckless indifference to his own interest.

The Court of Appeals held that he was bound to know that his brother's affairs were not prosperous from the nature of his own transactions with him. If this be true, then no man could continue to lend his money and credit to another without creating against himself evidence of a guilty knowledge. The more his loans and the more unbounded his confidence, the greater would be the evidence of his guilt. We respectfully contend that the law pronounces no such harsh judgments in the way of presumptions against the confidence which men repose in each other.

Nor can we agree with the statement of the Court that his deposition was not full nor frank. Of course it might be so characterized by any one who assumed in the outset that he was bound to know all about his brother's affairs if he denied such knowledge in his deposition. In his cross-examination it was assumed, notwithstanding his statements to the contrary, that in 1896 he knew of the debts of A. D. Story and of others, and it was further assumed in the questions propounded that he could have had no reasonable ground for believing that these debts had been paid. It can be no reflection upon

his credibility that his answers on cross-examination accorded with his previous statements and not with the facts assumed against him in cross questions. But a reading of his deposition will determine whether the criticism stated is just, and on that we rely for his vindication.

Again, we are compelled to take issue with the Court of Appeals on the proposition that the failure of Thomas Merriam to record the mortgage executed in 1897 "is significant of his knowledge of his brother's condition and of the effect upon his credit if recorded."

It is the testimony of all parties that I. B. Merriam and his co-tenant were making efforts to sell the coal lands at the time the mortgage was executed and continuously thereafter, and that after 1897 Thomas Merriam continued to loan money and credit to his brother even up to the time of their final settlement. So far as his interest was concerned there was no reason why the mortgage should not have been recorded and if he had known of the existence of the debt due to A. D. Story, and others of which he said he had no knowledge, he could not have assumed that they would delay all efforts to collect what was due them for a period of six years or more.

The fact that these creditors did delay for this length of time is evidence that they had implicit confidence in the honesty of I. B. Merriam, as was also shown by the fact that he was introduced as a witness in their behalf in this case. Upon what principle of reason is his brother to be denied the same right to trust in his in-

tegrity? He was, during all this time, a resident of Syracuse, N. Y., and was never in Chattanooga from April, 1899, until the visit when he contracted for the purchase of the coal lands. Instead of the failure to register this mortgage being significant of his knowledge of his brother's precarious condition, we insist that it is proof to the contrary. Nor is there any evidence, as we will show later in another connection, that any one of the debts reported was created after the execution of the mortgage in 1897.

It is also said by the lower courts that the fact that after carrying his brother for years Thomas Merriam demanded settlement out of the proceeds of the land sale was evidence that he knew his brother was insolvent and that he would lose a part of his indebtedness if it was not so paid.

But this conclusion is wholly at variance with the explanation proven by appellee and entirely ignored by the courts below in reaching the conclusion stated. In the first place it was perfectly natural that there should be a settlement at some time, and it can be no reflection on Thomas Merriam's honesty of purpose that he did not demand it until his health failed and he realized that his end was approaching. He then purchased the land for the very purpose of securing payment of his debts, the most of it being secured by mortgage on the lands he bought. The object of this purchase being the payment of the debts, the settlement at the time the deed was delivered followed as a matter of course.

Whether from the evidence introduced Thomas Mer-

riam had reasonable cause to believe that a preference was intended by his brother depended on the evidence showing what knowledge of his brother's condition he then possessed. And it was manifest error to treat the demand for a settlement as evidence of the existence of knowledge that would defeat his right to payment.

The conclusion of the lower courts on this branch of the case was reached on the assumptions that I. B. Merriam was insolvent, that he was bound to know it, and that he was in law held to intend the natural result of his act; and that Thomas Merriam was aware of his condition or of such suspicious facts as put him on inquiry and therefore affected him with notice of what he might have learned by an honest investigation. On the evidence cited we insist that the cause, for the reasons stated, should be reversed.

BUT IF A PREFERENCE WAS GIVEN AT ALL, WAS IT DONE WITHIN FOUR MONTHS BEFORE THE ADJUDICATION IN BANKRUPTCY?

It is true that the deed conveying the coal lands to Thomas Merriam was executed June 1, 1903, but it was not the transfer of the land that constituted the preference. The bill charged, and the Court held, that the preference consisted in the appropriation of the proceeds of this sale to the vendee's debts. According to appellee's own proof already cited, Thomas Merriam on November 15, 1902, contracted in writing for the purchase of this

and for the purpose of securing the payment of his own debts and of the debts upon which he was endorser for his brother. The delivery of the deed on June 1, 1903, was simply the consummation of the contract of November 15, 1902, which fixed the rights of the parties.

It is a universal rule that when an agreement is made for the sale of real estate the equitable title vests in the covenantee who thereby becomes trustee of the purchase money for the vendee, while the same contract makes the vendor the trustee of the title for the purchaser. This is also the law in Tennessee which controls in this case. Morgan vs. Shell, 3 Bax., 286; Whitby vs. Whitby, 4 Sneed, 473; Gass vs. Hawkins, Thompson's Cases, 243-245; Merriam vs. Polk, 5 Heisk., 722.

Such contract without registration vests in the vendee a title that may be reached by his creditors. Maloney vs. Beasley, 10 Heisk., 648-9; Ocoee Bank vs. Nelson, 1 Cold., 186, 192. It vests a title in the vendee that he can sell and transfer. Wilburn vs. Spofford, 4 Sneed, 698, 705; Thompson vs. Dawson, 3 Head, 384-5.. The purchaser or his assignee can enforce specific performance against the covenantor or any third party who may have purchased from him. Wilburn vs. Spofford, 4 Sneed, 698; Neal vs. Cox, Peck, 443; Smith vs. Peace, 1 Sneed, 591.

By this contract of sale I. B. Merriam, the vendor, parted with his interest in the real estate, and in its stead took a right to the purchase money which the vendee agreed to pay for the land. The land contracted to be

conveyed was converted into personal property of the vendor held in trust for him by the vendee. From the time the agreement was signed, November 15, 1902, Thomas Merriam owed his brother $75,000 for his one-half interest in the lands described in the agreement. But as he had purchased the land with the understanding that the proceeds were to be used in satisfying debts due to him from the vendor, and others that had been endorsed by him for the vendor, he was bound to pay in cash only the balance of the purchase price after deducting these debts. This balance was all he owed. The agreement was one by which the land was transferred and the proceeds appropriated to the payment of certain debts, and as such it was binding upon both parties under the laws of Tennessee. McGuffey vs. Johnson, 9 Lea, 555, 559; Wharton vs. Lavender, 14 Lea, 178; Kenzey vs. McDearman, 5 Cold., 392; Crudginton vs. Hogan, 105 Tenn., 448.

It is a general rule that an agreement to sell or appropriate certain property to the payment of specified debts creates an equitable lien. 3 Pom. Eq. Jur., Sec. 1235; Gest vs. Packwood, 39 Fed., 525; Walker vs. Brown, 165 U. S., 654.

The real consideration for the transfer of real estate may be shown by parole. White vs. Blakemore, 8 Lea, 661; Stockard vs. Stockard's Admr., 7 Hump., 303. In the latter case the deed expressed a consideration of $200.00; but parole proof was admitted to show that the vendee had purchased the land for the purpose of paying

a note endorsed by him and another for the vendor, and it was held that the proceeds should have been applied in the payment of said note.

The contract of November 15, 1902, fixed the rights of the parties thereto. It was the creation of a fund to satisfy certain debts. The agreement which created this fund appropriated it, so far as might be necessary, to pay the debts due from the vendor to the vendee and those upon which he was liable as endorser. It left nothing to be done by the vendee except to render an account and to ascertain the balance due from him on the basis of the orginal agreement. He did render to the vendor June 1, 1903, an account of the d[illegible] at Syracuse which had been paid by the sale. The balance of the purchase money was then turned over to the vendor on his undertaking to apply so much of it as might be necessary to discharge the debts of the vendee held at Chattanooga. These debts were paid and the agreement of sale was thus fully executed.

This was not a conveyance to hinder and delay creditors, and the purchase price was paid in full. There was no proof to sustain the charges of the bill to the contrary and no relief was granted upon this theory of the trustee's case. The right of recovery, therefore, depends entirely upon the question whether the trustee can complain of the manner in which it was agreed that the purchase price should be paid and avoid the agreement appropriating the purchase price to the payment of the vendee's debts.

If there had been no bankruptcy proceedings we think it would be clear that in June, 1903, I. B. Merriam would have had no legal right to compel his brother to pay him $75,000 in cash after agreeing to sell the land to pay the debts he owed his brother. He could have collected only the balance due after deducting the debts. Thomas Merriam had a right to retain so much of the fund representing the purchase price as was necessary to pay his debts, and this right or lien is one recognized not only by the laws of Tennessee but by the Bankrupt Act itself. The trustee took no better title to the property of the bankrupt than he had at the time of his adjudication. The title he took was subject to all equities and rights impressed upon the property in the hands of the bankrupt. Yeatman vs. Savings Institution, 95 U. S., 764-766; Stewart vs. Platt, 101 U. S., 731; Hauselt vs. Harrison, 105 U. S., 401; *In re* Howe, 1 Paige, 125; Hewitt vs. Berlin Machine Works, 194 U. S., 296; Thompson vs. Fairbanks, 196 U. S., 516; Sabin vs. Camp, 98 Fed., 974; *In re* Loveland, 155 Fed., 838; Hiscock vs. Varick Bank, 206 U. S., 28. In some of these cases and others it was held that no preference was given where the creditor within four months of his debtor's bankruptcy took possession of property by virtue of some valid contract made prior to the four months period. The anterior contract may be only a promise to give a mortgage or lien on specific property to pay or secure the creditor—provided it is not a bare promise relating to no particular property or fund. Atchison, T. & S. F. Ry. Co. vs. Hundley, 153 Fed., 507; Union Trust Co. vs. Bulkley, 150 Fed., 512; McDonald vs. Daskam, 116 Fed., 276.

Such a contract fixing the rights of parties is a transaction closed to the trustee after four months if it is free from fraud and binding on the bankrupt. Mayer vs. Hellman, 91 U. S., 496, 501; *In re* Kindt, 101 Fed., 107.

In the case at bar the trustee took no title to the land or the proceeds thereof because by the contract of November 15, 1902, the title to the land passed to Thomas Merriam with the right to appropriate the proceeds in the payment of the debts due to and endorsed by him. The sale was not fraudulent as to creditors, and could not be, and was not, set aside under Section 67e. And at the time of filing his adjudication the bankrupt had no interest either in the land or its proceeds which he could sell, or which could have been sold under execution against him. He had at the time he delivered the deed June 1 ,1903, only the right to call for settlement to ascertain that part of the purchase money which had not been appropriated by the original agreement. And in making settlement on this basis he did nothing more than he was legally bound to do, and did not give, or intend to give, a preference.

Both the lower courts held that the appropriation of the proceeds of the land sale to the payment of the debts of Thomas Merriam was made June 1, 1903, at the time the deed of conveyance was delivered; whereas in law and in fact the appropriation was made when the written contract for the sale was made for the purpose of paying the debts on November 15, 1902. A part of the indebt-

edness so paid was secured by the mortgage executed in favor of Thomas Merriam on the 24th day of September, 1897.

THE DEED OF TRUST OF SEPTEMBER 24, 1897.

We insist that both the lower Courts erred for several reasons in holding that this instrument was void because not intended by the parties thereto to operate as security for the debt named in it, and because fraudulently withheld from registration. Both of these propositions could not be true, but neither of them is supported by the facts under the laws of the State of Tennessee.

The execution of the deed of trust on September 24, 1897, to secure an indebtedness then amounting to $35,000 was proven by the appellee himself when he took the deposition of I. B. Merriam in this cause. The same fact is also proven by Thomas Merriam in his own behalf and the mortgage and deed of trust are both filed in evidence. From the evidence of these two witnesses it also appears that the note for $35,000 was mailed to the payee at the time of its execution and continued to be held by him until taken up on the final settlement. The mortgage securing this note, though signed by I. B. Merriam and his wife and acknowledged by them in due form, was not in fact delivered until April 11, 1899, when Thomas Merriam was on his next visit to Chattanooga. It was then placed in his possession and was by him turned over to his nephew, Thomas N. Merriam,

who had lived a considerable part of his time with his uncle in Syracuse, New York, and had for this reason been chosen as trustee. It continued in the possession of this nephew, the trustee, until after it was discharged, and at the first meeting of the creditors of I. B. Merriam he told of the execution of the note and mortgage, (Rec. p. 116) and at an adjourned meeting on the subsequent Monday he filed them with the Referee as exhibits to his deposition. (Rec. p. 121).

There has never been any controversy in this case concerning the execution of the note and mortgage at the time stated, or the fact that the mortgagor then owed the amount of debts secured thereby.

The mortgage was executed before the present Bankrupt Act was passed so that it could not have been designed to defeat any provision of that statute. Its validity is to be determined by the laws of the State of Tennessee.

Humphrey vs. Tatman, 198 U. S., 91.

It has always been held, construing the registration laws of Tennessee, that an unrecorded mortgage is good as between the parties thereto.

Grady vs. Sharon, 6 Yer., 323;
Green vs. Goodall, 1 Cold., 412.

That the lien of such mortgage is only displaced or postponed in favor of such judgment creditors as have fixed a lien upon the land by attachment, judgment and levy,

or other legal step taken before the mortgage is registered or discharged by payment.

Kenzie vs. McDeermond, 5 Cold., 392;
Lookout Bank vs. Noe, 86 Tenn., 29;
Bank vs. McCarty, 99 Tenn., 471;
Sanders vs. Everett, 3 Tenn. Chan., 523;
Gwynne vs. Estes, 4 Lea, 673;
Peacock vs. Tompkins, Meigs, 330.

So far we are in accord with the views of the Court of Appeals on this subject. (Rec. p. 284).

But the Court of Appeals on this question erred in the following respects: In holding that the mortgage was void because not intended to operate as security, and because it was a fraud upon the rights of other creditors on account of being withheld from registration, and because an inspection of the original instrument showed an erasure in the amount secured.

It is somewhat difficult to answer the assumption of the lower courts that this mortgage was not intended by the parties to operate as security for the debt named therein and which it purported to secure. It is said that the representations made by the mortgagor to his creditors that the land was unencumbered, and that he would pay them whenever he could succeed in selling the property, were inconsistent with his proposition that the mortgage should operate as a lien; that though dated September 24, 1897, it was agreed that it should not then be registered and was never registered before it was discharged by payment, and had during all the meantime

remained a secret lien upon the land; and that there was a conflict in the evidence as to whether it was executed at the mortgagee's suggestion, or was proposed by the mortgagor himself.

On account of these facts it was held that appellants had not sustained the burden of proof cast upon them by the law to show that the mortgage had "been executed, or intended to be executed and kept alive *bona fide* at all times as a specific charge upon the land." The facts stated would be pertinent on the other proposition, that is, whether the mortgage was void for fraud—if that question had been put in issue by the pleading. But there is no fact stated, as we respectfully submit, that rebuts the expressed intent of these parties in this instrument to secure the debt therein named.

As stated, both courts erred in holding that the mortgage was void because fraudulently withheld from registration. This question was not in issue under the pleadings and the conclusion of the Court is not supported by the evidence under the law as declared by the Supreme Court of Tennessee.

THE PLEADINGS.

The complaint filed by appellee alleges that the sale of the coal land to Thomas Merriam was without consideration and made to hinder and delay the creditors of the vendor, or, in the alternative, that the appropriation of proceeds to the payment of the debts of the vendee constituted a voidable preference.

The answer denied that the sale was made to hinder and delay creditors and stated the consideration paid and how it was paid.

It avers, concerning the mortgage, that I. B. Merriam's title "was encumbered to the amount of more than $40,000, by two several deeds of trust, one for the benefit of the defendant to secure him to the extent of $35,000 given by said I. B. Merriam to Thomas N. Merriam as Trustee, and dated and delivered on or about April 11, 1899; and one for the benefit of the First National Bank of Chattanooga to secure said bank to the extent of $4,000, the date of which deed is unknown by this defendant." (Rec. p. 11).

This is a distinct averment that at the time of the sale Thomas Merriam held the one mortgage for $35,000 and that the only other encumbrance was the $4,000 mortgage due the First National Bank of Chattanooga. The second mortgage was in fact due to the Chattanooga Saving Bank and the date of the first mortgage was September 24, 1897, and not April 11, 1899, as stated. It was on the latter date that this mortgage was in fact delivered.

At the time this answer was drafted by Mr. Page at Syracuse the $35,000 note had been delivered up by Thomas Merriam and the deed of trust securing it had been delivered up by the Trustee and both of them had been filed by the bankrupt with the Referee at Chattanooga.

Further along in the answer in giving a history of the

transactions preceding this mortgage it is stated that a mortgage to secure $25,000 of the same indebtedness had been executed in the summer of 1897. This also was a mistake of the draftsman, as will appear from his affidavit, and how it occurred is explained by the testimony of I. B. Merriam and of Thomas Merriam showing that in the early part of 1897 the debts did amount to $25,000; that Thomas Merriam was then in Chattanooga and his brother applied to him for an additional loan of $10,000 which was promised and made on or before the mortgage to secure the $35,000 was executed on the 24th day of September, 1897. This latter mortgage was also agreed upon at the time Thomas Merriam agreed to advance the additional $10,000. As previously stated, when the note for $35,000 was executed it was mailed, but the mortgage securing it was not in fact delivered until April, 1899, when Thomas Merriam was again in Chattanooga on another visit. There is no kind of conflict in the record about these facts.

On the affidavit made by Mr. Page concerning the variance between the date of the mortgage as proven, and as alleged in the original answer, and the discrepancies in the historical statements an amendment was permitted correcting the date and eliminating the averment that another mortgage had been executed.

The District Judge stated the issue made and as discussed before him as follows:

"The difficulty on this branch of the case grows out of that provision of the bankruptcy law which undertakes

to preserve and make good in the distribution of the assets every mortgage or other lien which is valid under the law of the State, and the contention in regard to this mortgage is that although it had never been recorded at the time of its payment, but had been kept secret and in a safe for something like six years, that it was nevertheless a valid lien as between the parties, and as to all persons except a judgment creditor.

It is not insisted and could not be, of course, that the land was not at any time subject to be taken under execution, or attachment, and subject to sale by the vendor to any innocent purchaser, but the contention is that as the lien, although secret and unrecorded, was good as between the parties and against creditors who had fixed upon the property no lien by levy or by judgment, its payment immediately before filing the petition in bankruptcy was the satisfaction of a valid lien and was an act equivalent to registration, or foreclosure of the mortgage, and that although within four months preceding bankruptcy, was good." (Rec. p. 260).

He held against appellants on this contention because, as already stated, they had not sustained the burden of the proof cast upon them by law to show that the mortgage was intended as security and was free from fraud. In adopting this conclusion he recited the facts that it was agreed not to register the mortgage, that it had always been kept secret, and that the mortgagor had frequently repeated that the property was unincumbered and thereby secured extension of his debts, etc. For

these reasons he held that the mortgage had been fraudulently withheld from registration and was therefore fraudulent and void under the principles declared in Brown vs. Eastman, 112 F. R., 592, and Thompson National Bank vs. Corwine, 89 F. R., 774. The first of these cases, construing the laws of Iowa, holds that a mortgage withheld from registration is good against creditors whose judgments were not obtained until after the mortgage was recorded, although the fact that it was withheld might be looked to in determining the good faith of the transaction—fraud having been charged in the bill and denied in the answer. In the second case it was held, construing the laws of Ohio, that withholding a deed from registration to enable the vendor to obtain credit was fraudulent as to all debts made or renewed after the deed was executed and before it was recorded. There was no reference in the opinion of the District Judge to the laws of Tennessee or the decisions of its courts on the effect of the non-registration of a mortgage.

We call attention especially to the fact that the District Judge does not refer to any variance between the mortgage as alleged in the answer and as described and set up in the proof. Or to an apparent erasure in the mortgage securing the $35,000 note. These questions appear for the first time in the opinion of the Court of Appeals where they are given a controlling effect.

According to the Court of Appeals, the answer, in effect, says:

"This was a valid *bona fide* lien, good between the par-

ties although unrecorded, and made more than four months before bankruptcy and the application of the purchase money in discharge of such a lien was not a preference.

The defense is a good one, but the burden of establishing the existence of such a valid pre-existing lien is upon the defendant who thereby seeks to escape liability as for a preference." (Rec. p. 286).

In other words, according to that court the burden was on appellants to show that the mortgage was not fraudulent and void, and the question whether or not the mortgage was fraudulent was by their answer thus put in issue.

The Court then states the variance between the allegations of the original answer concerning the date of the mortgage, and the fact that a preceding mortgage had been executed, and that there was an apparent erasure in the mortgage executed on the 24th of September, 1897, in the statement of the amount of the notes secured—it not being stated in this connection that the original note secured by the mortgage, and executed on the same day, was a note for $35,000 as stated in the mortgage, and that it was at the time of its execution mailed to Thomas Merriam and held by him until the final settlement with his brother, about June 1, 1903. Moreover, the Court states that when this note and mortgage were executed, that is, September 24, 1897, I. B. Merriam owed his brother only $25,000. It might be that in view of the uncontradicted testimony to the contrary that this

statement was inadvertently made. But from other parts of the opinion it will appear that the statement was a material one in the conclusions reached by the Court concerning the validity of the mortgage.

The Court of Appeals concurred with the District Judge in his conclusion and from the same fact stated by him that the mortgage was not intended to take effect as such—the evidence to this effect being the same as that cited by the District Judge, and which, as we insist, if pertinent at all, reflected only upon the question as to whether or not the mortgage was fraudulent and void.

The mortgage was held to be invalid as security because fraudulent, and because of the apparent erasure and because of the variance in the date as corrected by the amended answer. In these respects the Court of Appeals were not in accord with the District Judge because there is no reference to these questions in his opinion.

In this connection we desire to call further attention to the alleged erasure and variance which cut such an important figure in the decision of the Court of Appeals. The Court says that the erasure and also the variance in the statement of the answer concerning the date of the mortgage might have been explained in several ways, and should have been explained by the appellant's evidence. But no question concerning either was ever made by the pleadings or in taking the testimony until the case was being argued. The variance was then disposed of by the amended answer. The erasure only appears from an inspection of the original mortgage which was proven by

I. B. Merriam and filed as an exhibit to his deposition taken before his creditors and made a part of his deposition as taken by the appellee in this cause. It was overlooked by all parties until the case was being argued, or at least no attention was called to it until that time. It is, as we insist, fully explained by the original note written at the same time and about which there is no dispute. No attention was given to either of these questions by the District Judge when, if it had been deemed of importance, the cause could have been remanded to the docket for further proof. After the final decree of the District Court, entered on September 22, 1904, appellant's appeal to the Court of Appeals was allowed, October 1, 1904. Subsequently, that is, on December 1, 1904, counsel for appellee obtained an order directing the original trust deed to be sent up with the transcript; and appellants obtained leave to take up the original note secured by the deed. The erasure having been brought in this manner to the attention of the Court of Appeals was held not to be "consistent with the *bona fide* purpose to secure a lien for an honest debt." The variance was treated as evidence to the same effect. We earnestly insist that neither of these questions was put in issue by the pleadings of the appellee. The answer set up the mortgage and the fact that it had been discharged out of proceeds of the land sale. The evidence showed its execution and the existence at the time of the debt secured, but the lower courts have held that this mortgage was fraudulent and invalid without any pleading putting these questions in issue.

If the plaintiff claims relief on the ground of fraud on

the part of defendant it must be alleged either in the bill, or an amendment thereof if this be made necessary by any defense set up in the answer. Equity Rule 45. Bates' Fed. Eq. Procedure, Secs. 365, 520.

If the answer by way of defense sets up a receipt, a compromise agreement, or a deed, the general replication only puts in issue the truth of the plea—"the existence of the receipt as set forth in the plea." If the plaintiff desires to avoid on account of mistake or fraud the receipt, the compromise agreement, or deed, the bill should be amended so as to allege the fraud or mistake.

Smith vs. Craft, 17 Fed., 705, 709;
Horn vs. Detroit Dry Dock Co., 150 U. S., 610, 626;
Vattier vs. Hinde, 7 Pet., 252, 273;
Baker vs. Nachtrieb, 9 How., 126, 130;
Crockett vs. Lee, 7 Wheat., 522-527;
McClane's Admr. vs. Shepherd's Extrx., 21 N. J. Eq., 76, 78.

The holding in Very vs. Levy, 13 How., 345, is stated in the syllabus as follows:

"The creditor (the plaintiff) cannot now allege fraud in his debtor. It is not charged in the bill; and, although he may not have known of the agreement when the bill was framed, yet, when the answer came in, he might have amended his bill, and charged fraud."

In re McIntosh, 150 Fed., 546-549, it was held that a deed could not be set aside as fraudulent at the suit of the

grantor's trustee in the absence of allegations in the bill that it was withheld from record by agreement for the fraudulent purpose of giving to the bankrupt a false credit, or that the grantee concealed the fact that such deed had been made with the fraudulent intent to deceive and defraud the creditors of the grantor. The decision which we are now asking to be reviewed is cited as authority to this proposition, although without any such allegations a deed of trust was annulled on the ground that it had been fraudulently withheld from registration.

On the proposition that the deed of trust was not intended to take effect as a mortgage the proof was that the deed was actually delivered and that the paper secured thereby was held until discharged by payment. There is no evidence to support the finding of the lower courts that it was not intended to take effect and continue as security.

The rule in Tennessee is that if the execution of the instrument for the purpose intended is shown, a formal delivery is not necessary. Saunders vs. Harris, 1 Head, 206. The acceptance by the trustee and beneficiary is presumed in the absence of proof made to the contrary by attacking creditors; and acceptance made at any time relates back to the date of the conveyance. Furman vs. Fisher, 4 Cold., 630; McEwen vs. Bamberger, 3 Lea, 580; Wilson vs. Winters, 108 Tenn., 401.

In the present case, without any charge in the pleadings to that effect, it was held that the mortgage was void

for fraud, and also that it was never intended to take effect as a mortgage—the first proposition being impossible if the latter was true. And without any pleading calling attention to it the Court of Appeals inspected the mortgage and held that there was an apparent erasure which was inconsistent with its validity as a lien.

We will now call attention to the grounds upon which the mortgage was held void, and we think it will appear that there was a strained construction of the testimony due to the fact that it was applied by the Court to sustain a theory that was not in issue and which the evidence was not designed to support.

After stating the effect of the variance between the date of the mortgage as alleged and proven and the presumption against the validity of the mortgage on account of the erasure disclosed by its inspection the Court states the other facts "tending to throw further suspicion upon the *bona fides* of the mortgage." (Rec. p. 289). The facts thus referred to were as follows:

(1) That the transaction was between brothers and the mortgage was never recorded but remained a secret lien until disclosed in the bankruptcy proceedings; that the mortgagor lulled into inactivity his existing and subsequent creditors by assurances that this property was unencumbered and that the proceeds of it would be used to pay them when it was sold. No reference is made in this connection to the following facts proven by the appellee in the examination of I. B. Merriam. That all the debts proven against him, except those for merchandise fur-

nished Merriam & Son, were created before the mortgage was executed; that the most of them in amount were secured by mortgages on the real estate at Chattanooga—date not given, but all executed several years before his failure (Rec. p. 57); that he had told his largest creditor, the First National Bank of Chattanooga, the Brown Banking Company, another large creditor, and some others of the existence of this mortgage and that he believed his property at Chattanooga was ample to pay all his local creditors.

(2) It is next found that when the mortgage was first executed, September 24, 1897, I. B. Merriam was insolvent; that his business as a wholesale grocer was dwindling for lack of capital to carry it on; and that all his real estate other than the coal land was then mortgaged to its full value (a fact not in proof). It is then said, referring to I. B. Merriam:

"He entertained the hope that Chattanooga real estate would recover the values which prevailed when he acquired his Chattanooga real estate, and that if he could hold on he might or would save himself. This much his brother knew. His own loans were confessedly to enable him to tide over a period of depression by enabling him to continue business and hold on to his speculative but mortgaged investments." (Rec. p. 289).

We do not know just how much of knowledge of his brother's situation at the time stated the Court means to impute to Thomas Merriam. We do know from the uncontradicted testimony that Thomas Merriam did not

know in September, 1897, that his brother was insolvent; that he did not know that his brother's other real estate was mortgaged to its full value or to any other extent; that he then had and relied upon his brother's representations that the property he owned, including a large amount of real estate, was worth greatly more than all his debts—the principal part of this indebtedness being that which was then being secured; that he at all times thought he was his brother's principal creditor and that he was for this reason safe in not recording the mortgage. It is no doubt true that as a business proposition he thought it better for his brother to borrow from him what ready cash he needed rather than sell his property at a sacrifice.

(3) But it was further said that under the circumstances recited as existing on September 24, 1897, Thomas Merriam demanded a mortgage to secure the debt which had been growing for years, "and to secure other advances he might thereafter make"; that a note for $35,000 was taken though only $25,000 was then due, and that there was no intention disclosed in the mortgage to make it a lien for future advances; that Thomas N. Merriam, the Trustee named in the mortgage, was the son and partner of the mortgagor and that he was the person who held possession of the mortgage from and after its delivery in April, 1899.

Now on the uncontradicted testimony already cited the debts secured by this mortgage amounted at the time it was executed to $35,000. It was not, as stated by the

Court, a mortgage to secure future advances not specified in it. Nor was Thomas N. Merriam, the Trustee, a partner of the mortgagor. The mortgagor's partner was Frank Merriam. But these two erroneous conclusions of fact were given a potent effect by the Court as proof of the combined purpose of the parties—that the mortgage was not to go into effect as a specific lien for want of good faith—in other words, that it was not to create a lien at all, and that the lien was invalid because fraudulent as to other creditors.

If we except the errors stated the remaining evidence is that when the mortgage was executed it was agreed that it should not be recorded for the time being, and it had never been recorded up to the time it was discharged by payment of the debts secured; that at various times after the mortgage was executed the mortgagor represented to some of his creditors that it was unincumbered and that when he sold it he would use the proceeds to pay his debts, and thus secured time from some of his creditors. He explains that what he meant by this was that there was nothing covered under the name of his wife, and that all his property was subject to the payment of his debts, and that he did intend to pay his creditors when he sold his coal lands. (Rec. p. 81). However this may be, there is not one word of evidence that Thomas Merriam ever at any time denied having the mortgage, or in any manner concealed or attempted to conceal its existence.

Whether for any of the reasons stated the mortgage

was void must be determined by the decisions of the courts of Tennessee construing its laws regulating the registration of mortgages.

The following principles, as we contend, are well established in the laws of Tennessee:

That an unregistered deed of trust conveys an inchoate legal title, which may be ripened into a perfect one at any time by registration so as to relate back to its date. If the holder of a deed of trust neglects to record it, or purposely withholds it from registration, he takes the risk of losing his lien either by sale to an innocent purchaser, the registration of another mortgage, or a lien fixed upon the land by attachment or execution. But the failure to record vests no other right in any creditor, unless he can show that he has been purposely misled into giving credit to the mortgagor. With this exception a creditor's right depends strictly upon his obtaining a lien either by registered mortgage or by suit and levy of attachment or judgment.

Chester vs. Greer, 5 Hump., 24.

That the equity of the holder of an unregistered mortgage to secure himself by its registration is as great as that of the creditor who had innocently extended credit under the belief that the property was unincumbered. This principle is thus stated in Insurance Co. vs. Shoemaker, 11 Pick., 84:

"When disaster overtook the husband, in December, 1893, the equity of the wife to secure herself by registering her deed, previously made, was as great as that of the

creditor who had innocently extended credit under the belief that the property belonged to the husband, there being no fraudulent purpose shown in withholding the registration. Chester vs. Greer, 5 Hump., 34; Birdwell vs. Cain, 1 Cold., 300-303; Cowan, McClung & Co. vs. Gill, 11 Lea, 674; Bank vs. Walker, 14 Lea, 299."

That to constitute fraud in withholding a deed from registration there must be an intentional misrepresentation as to the existence of a mortgage such as would estop the mortgagee from setting up his lien against the creditor.

This proposition is sustained by the following cases: By Chester vs. Greer, *supra*, in which it appeared that the mortgagee had on several occasions denied that he had a mortgage, but it was not shown that the persons inquiring of him concerning the mortgage informed him that they intended to extend credit to the mortgagor. By Cowan, McClung & Co. vs. Gill, 11 Lea, 674, from the facts of which it appeared that the mortgagor was a member of a mercantile firm doing a large business, and which was enabled to continue in business apparently solvent and to contract a large indebtedness on account of the non-registration of the mortgage. In this case the Court said:

"In the case of Chester vs. Greer, already cited, Judge Turley says: 'It is contended on the part of the creditors that the deed of trust is void on the part of the *cestui que trust*, in this, that it appears that one of them, Samuel Greer, being interrogated as to whether he had a

mortgage or trust upon the property of Chester, denied that he had, and asserted that he was solvent and that persons might contract debts with his in safety. It is difficult to justify this conduct on the part of Greer, but still it does not affect his rights under the deed of trust, as the case is presented to our consideration. The complainants, from their own showing, are not in a condition to take advantage of this objection for two reasons: First, they are, as we have already held, creditors *in pais*, having neither judgments against Chester nor liens upon the property conveyed in the deed of trust.' After citing authorities to the point, the Court proceeds: 'These authorities have proven that the fact of misrepresentation, although a debt *in pais* may be contracted under it, will not vitiate the lien acquired by the mortgage or deed of trust, but that to have that effect a subsequent lien must be acquired upon the same property by the debtor contracting under the mistake, induced by the false information thus communicated to him.' 'But second: It is necessary to fix the fraud upon the prior incumbrancer that he should be informed of the intention of the person making the inquiry to lend money upon the credit of the encumbered property, for otherwise the fraudulent intention is wanting, and the mere falsehood is not sufficient for such purpose.'

"Try the present case by these rules. Here no representation has been made, no inquiry by complainants or others. Complainants are merely creditors *in pais*. There has been no denial of the existence of the deed, no assertion of the solvency of Samuel Gill. There were no

liens upon the property conveyed in trust, and no contracting under a mistake induced by a false representation communicated by defendants."

"If the facts that Greer denied having a mortgage and asserted the solvency of Chester, and declared that debts might be contracted with him in safety, would not defeat his unregistered trust, for stronger reasons an honest and unprovoked silence cannot be taken advantage of here."

The case of Chester vs. Greer, *supra,* has been followed as the rule in Tennessee ever since it was decided in 1844 and was again reaffirmed in Insurance Co. vs. Shoemaker, 11 Pick., 84.

In addition to this, the fact that a mortgage is not avoided by an agreement to withhold it from registration has been frequently declared as the law of other States having statutes similar to those of Tennessee. Curry vs. McCauley, 11 F. R., 366; Curry vs. McCauley, 20 F. R., 583; Matthew vs. Westfaul, 48 F. R., 664; Clark vs. Hezekiah, 24 F. R., 663; Sawyer vs. Turpin, 91 U. S., 114; Clark vs. Iselin, 21 Wall., 360; Bernhisel vs. Furman, 22 Wall., 170; Stewart vs. Platt, 101 U. S., 731. All these cases were decided under the Bankruptcy Act of 1867.

Under the foregoing cases, especially the rule as declared by the decisions of the Court of Tennessee, we contend that the mortgage to Thomas Merriam constituted a valid lien upon the land purchased by him, and that he

was not guilty of receiving a preference when he accepted payment of the debts secured thereby.

In re Rogers & Woodwell, 132 F. R., 560; Metcalf vs. Barker, 187 U. S., 165; Meyer Bros. Drug Co. vs. Pipkin Drug Co., 136 F. R., 396; Thompkins vs. Fairbanks, 196 U. S., 516; *In re* New York Economical Printing Co., 110 F. R., 514; *In re* Riddle Sons, 122 F. R., 559.

Not only did the Court hold that the mortgage was invalid, but it required the Executors of Thomas Merriam by the final decree to pay into court the sum of $18,990 due the First National Bank, although that concern had been informed of the existence of the mortgage and had held some of the paper intended to be secured thereby. The executors were also required to pay into court the sum of $5737.98 due to the Brown Banking Company, the controlling officials of which were closely related to the mortgagor and mortgagee and had been informed of its existence; the executors were also required to pay into court a considerable indebtedness due to the sons of the mortgagor, although one of them was the trustee named in the mortgage and was the party who had informed the mortgagee that registration of the mortgage was unnecessary; and the executors were also required to pay into court a sufficient sum to discharge all the mercantile debts of Merriam & Son, although the mortgagee was an individual creditor and had been paid out of the proceeds of individual property.

THE PARTNERSHIP CREDITORS.

Thomas Merriam was an individual creditor of his brother. The property he purchased belonged to his brother and not to the firm of Merriam & Son. While under Section 5 of the Bankrupt Act of 1898 the partnership creditors could prove their demands under the petition filed by I. B. Merriam, these debts could only be paid out of his individual assets after his individual creditors had all been satisfied. It was therefore error in the lower courts to require the executors of Thomas Merriam to pay in a sufficient amount out of the proceeds of said sale to pay off the partnership creditors. *In re* Jones, 133 F. R., 912; Buckingham vs. First National Bank, 131 F. R., 192; *In re* Groetzinger, 127 F. R.. 814; Vaccaro vs. Security Bank, 103 F. R., 436.

ATTORNEYS' FEES.

. . In proof of the value of their services appellee's attorneys have shown that they gained this suit although the witnesses they were compelled to introduce testified that the transaction was free from fraud. (Rec. pp. 324-328). The witness referred to is I. B. Merriam, who was appellee's principal witness in this cause, and the most of whose testimony was ignored by both of the lower courts. We cannot say that gaining this case in spite of the infirmities of their testimony should not enhance the amount of counsel's compensation. But we do insist that it was error to tax these fees as costs against the appellants.

The position of counsel for appellee on this subject was thus stated in their brief filed on the trial before the Court of Appeals:

"The position of the Trustee is this and nothing more —As Trustee he takes title to all of the property of the bankrupt's estate for the purpose of having same applied to the payments of all debts due by said estate and in the order provided by Section 64b, to wit:

> (1) The actual and necessary cost of preserving the estate subsequent to filing petition;
>
> (2) The filing fees paid by creditors in involuntary cases, and where property of the bankrupt, transferred or concealed by him, either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of such recovery;
>
> (3) The cost of administration, etc., etc., and finally, the general creditors.

Therefore, to the extent that Thomas Merriam took property of the bankrupt, either fraudulently or as an unlawful preference, he had property, the title to which goes to the trustee, and this property, or so much thereof as may be necessary, he must deliver to the trustee for the payments of the debts due by the bankrupt's estate, namely, costs, expenses, attorneys' fees, etc., and finally, the amount of the general claims. Counsel for the trustee are not asking appellant (or his executors now standing in his shoes) to pay their fees; they have no such claim against him. They are asking him merely to deliver to

the trustee so much of the preference as may be necessary to pay the fees owing by the trustee, which are one of the debts of the bankrupt estate."

But the principle stated applied to this case means that if an insolvent debtor pays to a creditor the amount due him under such circumstances as to constitute a voidable preference, the trustee, if he sues, may not only recover the amount illegally paid to the creditor, but twenty-five per cent in addition as counsel fees. We deny that there is any provision of the Bankrupt Act authorizing the imputation of this penalty, and it is contrary to the spirit of that act as declared by this Court in Keppel vs. Tiffin Savings Bank, 197 U. S., 356, and is clearly contrary to the expressed provisions of Section 824 of the Revised Statutes.

Respectfully Submitted
E. J. Page
Louis L. Waters
Foster V. Brown
Frank Spurlock
Solicitors for Appellants

Office Supreme Court, U. S.
FILED
MAR 12 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES

October Term, 1907.

No. [redacted]39.

E. J. Page and Robert Markert, Executors of Thomas Merriam, deceased,

Appellants,

vs.

H. F. Rogers, Trustee of I. B. Merriam, Bankrupt.

BRIEF FOR APPELLEE.

PRITCHARD & SIZER,
WILLIAMS & LANCASTER,
Solicitors for Appellee.

SUPREME COURT OF THE UNITED STATES

October Term, 1907.

No. 254

E. J. Page and Robert Markert, Executors of Thomas Merriam, deceased,

Appellants,

vs.

H. F. Rogers, Trustee of I. B. Merriam, Bankrupt.

BRIEF FOR APPELLEE.

This suit was brought in the District Court of the United States for the Southern Division of the Eastern District of Tennessee by the appellee, who is trustee in bankruptcy of one I. B. Merriam, to recover certain money which it is alleged was paid by the bankrupt to his brother Thomas Merriam within four months prior to the adjudication of bankruptcy, which payment it is contended constituted an unlaw-

ful preference, and was in violation of the provisions of the bankruptcy law. The District Court decreed in favor of the trustee in bankruptcy and on appeal the judgment of that Court was affirmed by the Circuit Court of Appeals, and the case has now been appealed to this Court from the judgment of the Circuit Court of Appeals. The original defendant, Thomas Merriam, has died pending the litigation, and the case has been revived against his executors, who are the appellants in this Court.

The bankrupt I. B. Merriam had been for a number of years prior to the filing of his petition in bankruptcy engaged in the wholesale grocery business in Chattanooga. At one time he seems to have stood quite well financially; but for eight or ten years prior to his failure his condition had been exceedingly precarious, and it was only with the greatest difficulty that he was able to keep on his feet. He owned at the time of filing his petition in bankruptcy, in June, 1903, several pieces of real estate in Chattanooga, all of which, however, were encumbered to practically their full value; a stock of goods which had been gradually dwindling for a number of years and was at that time worth only about $1,200; and good accounts receivable amounting to about $1,600. This constituted his entire apparent estate.

Against this, the debts scheduled against the estate of the bankrupt amounted to about $75,000 of which about $38,000 was secured by mortgages or deeds of trust on the real estate, and about $37,000 was unsecured. The record shows that nothing in excess of the secured indebtedness was realized out of the real estate; so that the only property disclosed by the schedules of the bankrupt which was available for payment of unsecured debts aggregating $37,000, was the remnant of his stock of goods, worth about $1,200, and about $1,600 of accounts receivable, in all about $2,800.

Up to within a few days prior to the filing of his petition, the bankrupt was the owner of a one-half interest in a valuable tract of coal land in Cumberland County, Tennessee. He had owned this for a number of years, and it had constituted his principal and practically his only basis of credit for probably ten years past. His interest in this land was supposed to be worth from $75,000 to $100,000; it was unencumbered, so far as the records showed, except to the extent of $2,000, being Merriam's one-half of a debt of $4,000, made by himself and his co-tenant, G. H. Jarnagin, jointly, and secured by a deed of trust on the interests of both the co-tenants, and Mr. Merriam had repeatedly stated to his creditors that there were no other

encumbrances on the land, and that whenever he effected a sale of it he would pay his debts in full. About the first of June, 1903, this land was conveyed by I. B. Merriam and G. H. Jarnagin to Thomas Merriam, and the purchase price agreed upon for I. B. Merriam's interest was $65,000 cash and $20,000 of the stock of a corporation to which Thomas Merriam was to convey the land and which was to open and operate coal mines thereon. Of the $65,000 cash consideration Thomas Merriam applied $43,374.06 in paying off certain notes of I. B. Merriam, some of which were payable to Thomas Merriam directly and the remainder of which were payable to a bank in Syracuse, New York, where Thomas Merriam resided, and on which Thomas Merriam was surety or endorser. This left between $21,000 and $22,000 of the cash consideration. In addition to this, Thomas Merriam endorsed a note for I. B. Merriam, at the time the sale was made, to a bank in Syracuse, for about $3,300, which I. B. Merriam discounted and the proceeds of which he took back to Tennessee with him; and to protect his brother against his endorsement on this and two other notes aggregating in all $10,000, I. B. Merriam transferred to him the $20,000 of stock which had been issued as part payment for the

coal land as hereinbefore stated. I. B. Merriam was in Syracuse when this trade was consumated; and having received from his brother Thomas the remainder of the cash consideration for his interest in the coal lands, and the proceeds of the note discounted in the Syracuse bank, aggregating in all about $25,000, I. B. Merriam immediately returned to Chattanooga and applied this money as follows:

There was, as has been already stated, a debt of $4,000 secured by a deed of trust on this land, Merriam's proportionate share of which was $2,000; and certain conflicting claims, within the boundaries of the tract owned by Merriam and Jarnagin had been purchased from one T. A. Wright and Merriam's share of the purchase price of these conflicting claims, which under the contract of purchase by Thomas Merriam was to be paid out of the sum he was paying for the land, amounted to about $5,400. I. B. Merriam therefore paid, out of the money which he brought to Tennessee with him on his return from Syracuse, these two prior liens aggregating about $7,400. The remainder of the money he brought back with him, with the exception of some $3,000 or $4,000, which was applied on other claims, was used in paying off all notes payable to banks and individuals in Chattanooga and vicinity on which Thomas

Merriam was endorser for his brother. The result, as will be seen, was that all of the money received by I. B. Merriam from the sale of his interest in the coal lands, aggregating over $68,000, was applied to payment of obligations either payable directly to Thomas Merriam or on which he was endorser, with the exception of some $3,000 or $4,000; and in this way every debt of I. B. Merriam in which his brother Thomas was in any way interested was paid off. Having completed the disbursement of funds brought back with him from Syracuse, I. B. Merriam filed his petition in bankruptcy; and the trustee elected by his creditors has brought this suit to recover the proceeds of the sale of the coal lands which were applied by Thomas Merriam to the discharge of the indebtedness payable to him and on which he was bound, on the grounds that in the first place the conveyance by I. B. Merriam to his brother was fraudulent in fact, and in the second place that at the time the proceeds of sale were appropriated as stated I. B. Merriam was insolvent and his brother Thomas had reasonable cause to believe that such was the case, and therefore the appropriation of the proceeds of sale by Thomas Merriam constituted an unlawful preference under the provisions of the bankruptcy act.

The contentions of the defendant, as made

and insisted on in the Courts below and renewed and reargued here are substantially as follows:

1. That the proof does not show that I. B. Merriam was insolvent when the conveyance of the coal land was made, and the proceeds arising from the sale thereof were appropriated in the manner complained of.

2. That the proof does not show that Thomas Merriam had reasonable cause to believe, at the time he received the alleged preference, that it was intended thereby to give a preference.

3. That at the time of the appropriation of the proceeds of sale Thomas Merriam held a deed of trust on his brother's interest in the coal land in question, to secure $35,000 of indebtedness, which had been duly executed and delivered in September, 1897, and which, although unrecorded, was valid as between the parties; that no lien had been fixed on the land by any creditor prior to the sale and appropriation of the proceeds thereof; and that therefore, to the extent of the mortgage debt, the appropriation of the proceeds of sale was a satisfaction of a valid lien created more than four months prior to the filing of the petition in bankruptcy.

4. That I. B. Merriam's interest in the coal lands had really been appropriated to satisfaction of the indebtedness to his brother by a contract made in November, 1902, of which the conveyance made in June, 1903, was only the consumation; and that therefore if there was any preference it was given more than four months before the filing of the petition in bankruptcy.

5. That Thomas Merriam was an individual creditor of the bankrupt and, as between himself and creditors of the firm of which the bankrupt was a member, had a superior right to the property owned by the bankrupt individually; and that, therefore, whatever the rights of other individual creditors might be, the firm creditors would have no right to complain of a preference given by the bankrupt to his individual creditors out of his individual property.

6. That in any event, Thomas Merriam, and his representatives, would only be liable for so much of the money unlawfully appropriated by him, if the appropriation complained of was unlawful, as would be necessary to pay the other debts of the bankrupt; and that he should not be required to also pay the expenses and attorneys' fees incurred by the trustee, in addition to the debts.

We will proceed to consider these propositions in the order stated.

It is to be remarked at the outset that the questions whether I. B. Merriam was insolvent when the alleged preference was given, whether Thomas Merriam had reasonable cause to believe that it was intended thereby to give a preference, whether the mortgage in question was given in good faith, or was intended as a valid and *bona fide* security, or was abandoned, and various minor questions argued in brief for appellants, are all questions of fact, in the determination of which the two lower Courts have concurred; and therefore, as is conceded by opposing counsel, this Court will not disturb or reverse these concurrent findings unless they are clearly erroneous.

Stuart vs. Hayden, 169 U. S., 1;

Baker vs. Cummings, 169 U. S., 198;

Illinois vs. Illinois Cent. R. R. Co., 184 U. S. 77;

Shappiro vs. Goldberg, 192 U. S., 232.

"When the trial and appellate Courts agree as to the facts established on the trial, this Court will accept their conclusion, and will not attempt to weigh conflicting testimony."

Beyer vs. LeFevre, 184 U. S., 114, 119.

"There is evidence upon which the fact as found may be based, and it is not so plainly erroneous as to call upon this Court to vary from its usual rule not to review the unanimous finding upon questions of fact of two Courts, unless such finding is plainly erroneous."

Hi-Yu-Tse-Mil-Kin vs. Smith, 194 U. S., 401, 412.

I.

THE INSOLVENCY OF I. B. MERRIAM

We do not take issue with the contention of appellant's counsel that insolvency at the time of filing the petition in bankruptcy does not establish insolvency at any prior date; although on the other hand this Court has said that where the quantity and value of the assets of a debtor have not materially diminished between the date of giving the preference and the date of filing a voluntary petition in bankruptcy, it is a legitimate conclusion that the bankrupt was insolvent on the first mentioned date.

Clarion Bank vs. Jones, 21 Wall. 325.

And it has been held that the books, schedules and appraisement of the bankrupt's property are competent evidence on the question of his insolvency, not only on the date of filing his

petition in bankruptcy, but on a date previous thereto, if not too remote.

In Re Docker-Foster Co., 123 Fed., 190;

In Re Mandel, 127 Fed. 863.

It will be remembered in this connection that it was on June 1st that I. B. Merriam, in Syracuse, N. Y., made the preferential payment to his brother complained of by the trustee and started back home; that he arrived in Chattanooga on June 3rd; that he went to his lawyer to have his petition in bankruptcy prepared on June 6th, which was Saturday, and that the petition was actually filed on June 9th. The interval between June 3rd and June 9th was used by Mr. Merriam in taking up the various notes in Chattanooga on which his brother's name appeared, and it may be remarked in passing that the proof shows, without any contradiction, that during this interval his anxious creditors had great difficulty in seeing him.

Test. R. T. Wright, Rec. p. 33.

There was not much chance, it would seem, for any very radical change in his financial condition to have taken place during this nine days.

But there is ample evidence, direct, positive and undisputed, that I. B. Merriam was insolv-

ent not only when the alleged preference was given, but for many years prior thereto.

(*a.*) *I. B. Merriam himself* testifies as follows:

"Q. State how long before your act of bankruptcy it was that the aggregate of your property, exclusive of any property which you may have conveyed, transferred, sold or removed, with the attempt to deceive or delay creditors, was insufficient, at a fair valuation, to pay your debts?

"A. I could not answer that question intelligently.

"Q. Isn't it a fact that for more than four months next preceding the filing of your petition you were insolvent within the definition I have just read?

"A. I do not know that I was.

"Q. Don't you know that for more than four months preceding the filing of your petition you were insolvent?

"A. *I know it now, but I did not know it then. I did not believe that I was.*"

Rec. pp. 117-118.

(*b.*) *A. D. Storey,* his former partner in business, and to whom Merriam still owes an indebtedness of over $9,000 contracted in 1896

when they dissolved partnership, says that aside from his coal land Merriam "was insolvent when I first went with him (which was in 1892) *and has been ever since.*"

Rec. p. 210.

(*c.*) *T. G. Montague,* the President of the First National Bank, with which Merriam did business, says that the coal land was his sole basis of credit; that aside from it Merriam was "absolutely insolvent," and his testimony indicates that this condition had existed for a number of years prior to the bankruptcy.

Rec. p. 199.

It is true, as said in brief of opposing counsel, that the witness' bank continued to discount paper for Merriam up to within ten days of his bankruptcy, but they did it as he explains, because Merriam had gotten largely into their debt, through the discount by them of notes made by his customers which were dishonored, and they could do no better than to renew these notes and carry them on.

Rec. p. 202.

(*d.*) *H. B. Case* says that Merriam frequently told him that "his real estate in the city was encumbered and that except for his coal land, he would not be able to pull through."

Rec. p. 27.

And numerous other witnesses testify to the same effect.

(*e.*) The undisputed evidence as to his assets and liabilities demonstrates that Merriam was utterly insolvent at the time the preference complained of was given.

(1) *His real estate* consisted *first* of his store property on Chestnut street, which he undertakes to say was worth about $27,000. He admits, however, that for several months prior to his bankruptcy he tried to sell it without success for $20,000. It was appraised at $20,000, and the mortgage creditors took it by consent of the other creditors at about that price.

Test. I. B. Merriam, Rec. pp. 104-105.

Second, His home property was appraised at $6,500. The encumbrance on it amounted to $5,465, and the bankrupt was entitled to a homestead of $1,000 out of it. By consent of the creditors, the mortgagee took the property in satisfaction of his debt and assumed the homestead in addition thereto. Mr. Merriam says the property "has been estimated by other parties to be worth $8,500," and he thinks it ought to have been worth that amount.

Rec. p. 84.

There is no other evidence that it was worth more than the valuation placed on it by the appraisers.

Third, Two lots on Montgomery avenue were appraised at $3,800 and encumbered to the amount of $4,800. They were taken by the mortgagee, by consent of the other creditors, in satisfaction of the mortgage debt, and the bankrupt makes no complaint about the transaction and does not contend that the property was worth any more than the encumbrance.

Fourth, Certain lots in outlying districts of Chattanooga were so heavily encumbered that the mortgage creditors would not take them in satisfaction of their debts, and the other creditors refused to bear the expense incident to having them sold by the trustee. They were therefore sold at public auction in foreclosure of the mortgage and brought less than the mortgage debts.

Rec. p. 25.

The appraisers were all real estate men, and presumably familiar with the value of such property.

Rec. p. 24.

The bankrupt himself testifies that this real

estate *was worth more in June, 1903, than it had been at any time since 1890.*

Rec. p. 57.

Even according to the inflated valuations put by Merriam himself on some of this real estate, it is manifest that the surplus above the encumbrances could not have amounted to more than $7,000 or $8,000; while, according to the report of the appraisers, the surplus was about $2,000, and as a matter of fact no surplus whatever was realized. The encumbrances had all been standing for several years prior to the bankruptcy.

Rec. p. 57.

(2.) *The stock of goods and fixtures.*

The stock was appraised at $1,183.41 and the fixtures at $103.05; and the stock and fixtures together brought only $1,000. The bankrupt does not undertake to testify to any value in excess of these amounts.

Rec. p. 49.

Mr. Story, his former partner, says he was in Merriam's store frequently from September, 1902 to May, 1903; and that during that period the value of the stock he carried was from $1,200 to $1,500.

Rec. p. 210.

N. Dietzen, another witness, says that during the year or so preceding the bankruptcy Merriam had "hardly anything at all but a few lots of goods he had had there for a long time—goods there was not much demand for;" and his manner of conducting business was to go out and buy goods as he would receive orders for them.

Rec. p. 213.

R. T. Wright, who has formerly been in the grocery business, says he wondered how Merriam could run a wholesale store with the goods he had on hand, which consisted principally of canned goods, of little value, stacked up in front of the store to make a good show; that he found on inquiry that Merriam was practically doing no good; that when he received orders he had to go out and buy goods to fill them with—getting them "from hand to mouth so to speak."

Rec. p. 33.

Other testimony is to the same effect, and there is no evidence to the contrary.

(3.) *The accounts and bills receivable.*

The face value of these amounted to $21,000. The trustee says that with the exception of about $1,600 they are absolutely worthless.

Rec. pp. 25-26.

The bankrupt testifies about them as follows:

"Q. Now Mr. Merriam, in your schedule of assets, filed with your petition in bankruptcy, you set forth a large list of accounts receivable, aggregating something like twenty or twenty-five thousand dollars. As a matter of fact, practically all of those accounts are of long standing, are they not, and worthless?

"A. Part of them, yes sir, not all of them.

"Q. I didn't ask you about all of them, I asked you about the larger part of them.

"A. I think the biggest half of them, yes sir.

"Q. As a matter of fact, the trustee has been able to collect not over $800 or $900 out of these accounts?

"A. I think he has collected more than that. I have not seen him this week, but I think he has collected from $1,000 to $1,500.

"Q. At all events,he has not collected more than $1,000 out of this list of accounts which you filed with your schedule?

"A. Probably not.

"Q. How far back do many of these accounts date, Mr. Merriam?

"A. Some of them date back as far, I expect, as 1887.

"Q. And farther?

"A. I can't say as too that.

"Q. And they have been carried on your books as assets ever since?

"A. We had the notes as assets."

Rec. pp. 65-66.

And there is no evidence to contradict that of the trustee as to the actual value of these notes and accounts.

Taking Mr. Merriam's own view as to the value of the real estate in excess of the secured debts, and putting it at $8,000; estimating the value of the stock of goods and fixtures at $2,000, which is in excess of what the record shows; and accepting as the value of the bills and accounts the testimony of the trustee which is the only definite evidence on the subject, and which puts it at $1,600; the entire value of the assets available for payment of unsecured debts amounting to $37,000 is the sum of $11,600.

And the bankrupt says that *the relative quality of his assets and liabilities had not materially changed for the last six or seven years.*

Rec. p. 65.

See also Rec. p. 133.

It is submitted, therefore, that not only does the weight of the evidence show that I. B. Merriam was hopelessly insolvent at the time the alleged preference was given, but that no other conclusion could possibly be reached from his own testimony.

Insolvency exists, within the meaning of the Bankruptcy Act, "whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

Bankrupt Act of 1898, Sec. 1.

It is said, however, that the evidence does not show the insolvency of I. B. Merriam as an individual, as distinguished from the firm of Merriam and Son, because there is no distinction made in the proof or in the opinions of the lower Courts between the assets and liabilities of the one and the other; and that "whether I. B. Merriam was insolvent in such sense that he could not pay an individual creditor by the transfer of individual assets without being guilty of a voidable preference would necessarily

depend on the further question whether or not the aggregate of his individual property was equal to the total amount of his individual debts."

The simple, and as it seems to us conclusive, answer to this contention is that there never was, in law and fact, any such firm or partnership as Merriam & Son; that from the time he bought out Storey, in 1896, I. B. Merriam was the sole owner of the business which was subsequently run in the name of Merriam & Son; and that Frank Merriam, the "son" of the so-called firm, was merely an employee of his father at a stipulated salary, and had no other interest in the business. These are the facts as testified to by I. B. Merriam himself, and not controverted.

Rec. pp. 58-59.

That, under these facts, Frank Merriam was not a partner with his father and that his father was the sole owner of the business and the only person liable for its debts seems to be well settled.

Berthold vs. Goldsmith, 24 How. 536, 543;

Beckwith vs. Talbot, 95 U. S. 289, 293;

Mehan vs. Valentine, 145 U. S., 611, 624-625;

Gentry vs. Singleton, 128 Fed. 679, 682.

The contention of appellants seems to be, not that I. B. Merriam was not *in fact* insolvent when the preference was given, but that *he did not know* or *did not believe* that he was insolvent. In other words it seems to be argued that notwithstanding his actual condition, the bankrupt was of such a sanguine and hopeful disposition that he still believed he would be able to pay all his debts, and did not realize that the effect of the transactions with his brother would be to prefer the brother over other creditors. Without going into his testimony in detail, we confidently submit that the testimony of I. B. Merriam shows conclusively that he did know that he was insolvent, and that the necessary effect of the appropriation of the coal lands was to prefer his brother over other creditors; and futhermore, we submit that I. B. Merriam cannot be heard to say, or his brother to contend, that they did not anticipate or expect what the record shows was the necessary and inevitable consequence of their acts.

"Persons of sound mind and discretion must in general be understood to intend, in the ordinary transactions of life, that which is the necessary and unavoidable consequences of

their acts, as they are supposed to know what the consequences of their acts will be in such transactions."

Clarion Bank vs. Jones, 21 Wall., 325, 337.

See also *Bean-Chamberlain Mfg. Co. vs. Standard Spoke & Nipple Co.* (Cir. Ct. of App. Sixth Circuit), 131 Fed., 215.

II

DID THOMAS MERRIAM HAVE REASONABLE CAUSE TO BELIEVE THAT IT WAS INTENDED, BY THE PAYMENTS COMPLAINED OF, TO GIVE HIM A PREFERENCE?

We think there can be no serious controversy as to the legal principles which must control the determination of this question. It is cheerfully conceded that reasonable cause to *suspect* that a person is insolvent is not equivalent to reasonable cause to *believe* that he is so; but that, in the language of this Court in *Grant vs. Bank*, 97 U. S., 80, quoted in appellants' brief, in order to avoid a payment as an illegal preference the creditor "must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man." But on the other hand, it must be conceded that it is not necessary to show that

the creditor *actually did* believe that the debtor was insolvent when the preference was given, but there must be attributed to him the conclusions and inferences which an ordinarily intelligent man would draw from the facts known to him.

"If it appears that the debtor giving the preference, whether a merchant or a trading company, was actually insolvent, and that the means of knowledge on the subject was at hand, and that such facts and circumstances were known to the creditor securing the preference as clearly ought to have put him, as a prudent man, upon inquiry, it would seem to be a just rule of law to hold that he had reasonable cause to believe the debtor was insolvent if it appears he might have ascertained the fact by reasonable inquiry. Ordinary prudence is required of a creditor under such circumstances, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge it is reasonable to suppose he would have acquired if he had performed his duty."

Buchanan vs. Smith, 16 Wall., 277, 308.

See also—

Toof vs. Martin, 13 Wall., 40;

Tiffany vs. Lucas, 12 Wall., 40;

Walbrum vs. Babbitt, 13 Wall., 577;

Wager vs. Hall, 13 Wall., 584;

Dutcher vs. Wright, 94 U. S., 553;

Bank vs. Cook, 95 U. S. 343;

In Re Manning, 123 Fed., 182;

In Re Virginia Hardwood Mfg. Co., 139 Fed., 209.

Counsel for appellants seem to think that this Court in *Grant vs. Bank, supra*, disapproved of the rule laid down in *Toof vs. Martin* and other cases following it. But we respectfully submit this is a mistake. There is no conflict between the two lines of decisions, but on the contrary, each sustains and supplements the other. In the case of *In Re Egbert*, 102 Fed., 735, the Circuit Court of Appeals for the Seventh Circuit reviews both lines of decisions and summarizes them as follows:

"The supposed conflict between the cases is imaginary, not real. In *Grant vs. Bank*, and the cases subsequent in point of time, the Court was dealing with the facts spread upon the record, and did not find occasion to consider the facts and circumstances which, brought home to the creditor, would put him upon inquiry of his debtor's financial condition. In

the cases antedating *Grant vs. Bank* the question of notice arose and was considered. The resultant of all these decisions we take to be this: That the creditor is not to be charged with knowledge of his debtor's financial condition from mere non-payment of his debt, or from circumstances which give rise to mere suspicion in his mind of possible insolvency; that it is not essential that the creditor should have actual knowledge of, or belief in, his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent; that if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose."

102 Fed., 741.

Applying then, the principles laid down in the cases cited to the facts established in this record, did Thomas Merriam have reasonable cause to believe, when he applied the proceeds of his brother's coal land to the payment of indebtedness due to him and on which he was surety, that his brother was insolvent, and that he was obtaining a preference by virtue of the transaction?

We have already shown that at the time of the bankruptcy, and for some years prior thereto, the bankrupt's real estate in Chattanooga was encumbered by mortgages to practically its full value. This was shown by the public records, and was a matter of common knowledge in Chattanooga, as is shown by the testimony of numerous witnesses. His only other property, aside from the Cumberland county coal land, was the remnant of his stock of goods, and the collectible accounts and notes, which were so small in proportion to the amount of his indebtedness as to hardly merit consideration. That Thomas Merriam knew that this coal land was the only means his brother had of paying his debts, and that it was not sufficient to pay all his debts, is directly shown by the following testimony of the bankrupt himself:

"Q. Didn't he know that unless you sold the coal land, you could not pay him?

"A. Yes sir.

"Q. Knew that was the only means by which you could pay your creditors and hope to get out of debt?

"A. Yes sir.

"Q. And without the sale of that property you could not pay even the interest on the

debts you had outstanding, didn't he know that?

"A. This $43,000 I owed him was accumulating all along.

"Q. I understand the cause of that, but that is not my question. Please answer the question?

"A. I could not pay my indebtedness without the sale of that land.

"Q. Still, you have not answered my question, Mr. Merriam, you will please read that question to him again.

(Question read to witness.)

"A. I could not make payments without selling the land.

"Q. You could not pay without the sale of that land?

"A. No sir, I could not.

"Q. And your brother knew that?

"A. Yes sir.

"Q. Your brother also knew that you owed large amounts to other parties?

"A. He knew that I owed $85,000 to $100,000 four years ago.

"Q. Did your brother expect to get his debt in full out of the sale of these coal lands?

"A. Yes sir, I think he did.

"Q. What did he think would become of the other creditors and their claims?

"A. We believed we could sell the property for enough to pay the other debts.

"Q. You don't know what he believed, do you?

"A. I think he believed that.

"Q. I am not asking for your opinion as to what he believed. I want to know if he expected to use the money coming from the sale of that property to the exclusion of the rights of all other creditors?

"A. He never said anything about the other creditors. He simply stated that he wanted his pay from the sale of the land.

"Q. Now, how could your brother believe that by the sale of that land all your creditors would be paid?

"A. He believed that with the money I brought back I might be able to get an extension of time on a good many of them, and finally sell the other property and pay out.

"Q. Then your brother did not believe that by the sale of the coal land you would be able to pay off your indebtedness?

"A. All the indebtedness? No sir.

"Q. He only believed that by using it you could pay part on his debts and get extensions of time, and then trust to luck in selling the other property, and thus in some way pull out of the hole?

"A. I expected to be able to do so; yes sir.

"Q. But as a matter of fact, when he found you could not do that, he took all the purchase price for his own use, and left nothing to other creditors?

"A. The statement shows that I paid out over $12,000.

"Q. We have already discussed that. As a matter of fact, did he not take up all the money coming from the sale of that property for his own exclusive use and benefit, and permit you to use none of it for the other creditors?

"A. And in paying notes he was endorser on here.

"Q. So in paying that, he was paying himself—or saving himself from liability?

"A. Yes sir."

Rec. pp. 72-73.

And in another place he says:

"Q. This deal was under consideration for some time, was it not?

"A. Yes sir; since the 26th of last November, I think.

"Q. And you and your brother—of course he was familiar with your situation and knew about how you were fixed financially?

"A. Yes sir.

"Q. That is, he knew your financial condition?

"A. Yes sir, something about it.

"Q. He knew you were hard pressed?

"A. Yes sir."

Rec. p. 115.

And still further he says:

"Q. Now, Mr. Merriam, for some years your brother, Tom Merriam, in New York, has known that you were very hard up, has he not?

"A. He has known that I owed considerable money.

"Q. Has he not also known that you were finding great difficulty in meeting your obligations?

"A. Why he has known from the fact that I was borrowing money from him that I owed considerable money.

"Q. Have you not frequently importuned him for money, to renew your paper and endorse your paper for several years?

"A. He has been renewing over and over as shown by the statement.

"Q. Has he not, in fact, known you were very hard up for five or six—and especially for four or five years?

"A. I suppose he knew that I owed a good deal of money."

Rec. pp. 66-67.

"Q. When he was here three or four years ago, did he not know how you were fixed financially?

"A. I told him I owed eighty-five to one hundred thousand dollars.

"Q. Did he know your financial condition at that time?

"A. Yes sir."

Rec. p. 68.

And it will be remembered that in another place the bankrupt says that his condition, that is, the relative proportion between his assets and liabilities, had not changed materially during the last six or seven years preceding his bankruptcy.

In the examination of the bankrupt by counsel for Thomas Merriam, the following occurs:

"Q. I will ask you to state Mr. Merriam, if you did not tell your brother at the time, or give him to understand, that if you received that amount you would be able to settle with all your creditors?

"*A. No, I did not tell him that I would be able to settle with all my creditors. I told him I might be able to fix up all my matters so I could close up my business by selling some of the property.*"

Rec. p. 100.

The indebtedness of I. B. Merriam to his brother Thomas originated in about 1893, and was increased, up to the fall of 1897, at which

time the last loan seems to have been made. From that time on down to the time of the sale of the coal lands nothing whatever was paid on this indebtedness, nor was even any interest paid on it; but the notes of the bankrupt to his brother, and to the bank in Syracuse, on which his brother was endorser, were renewed every sixty or ninety days, and on each renewal the interest was calculated and included in the renewal note.

Rec. p. 52.

In addition to this, it appears that for a year or two prior to the bankruptcy, I. B. and Thomas Merriam were in the habit of making drafts for equal amounts on each other, the one being in Syracuse, N. Y., and the other in Chattanooga, Tenn., in such a manner as to indicate to the bankers that they were carrying the amount represented by these drafts between Chattanooga and Syracuse, for the purpose of getting the temporary use of it.

Test. T. G. Montague, Rec. pp. 203-204;

Test. W. A. Sadd, Rec. pp. 196-197.

Thomas Merriam was also endorser on sundry notes of his brother to banks and individuals in Chattanooga; and the only payments ever

made on any of these notes from the time they were first given, up to the time the coal land was sold, were made by Thomas Merriam. On August 14, 1902, the President of the Chattanooga National Bank, which had shortly prior thereto bought out the Third National Bank of the same city, and among other assets of that bank had acquired four notes of I. B. Merriam endorsed by Thomas Merriam, wrote the latter as follows:

"August 14th, 1902.

"Thomas Merriam, Esq., Syracuse, N. Y.

DEAR SIR: We hold here bearing your endorsement, the following paper, i. e.:

Merriam & Son, due September 14th, $1,500.00; I. B. Merriam, due September 22d, $1,000.00; Merriam & Son, due October 7th, $1,000.00; Merriam & Son, due October 10th, $1,000.00.

We wish you to take notice, Mr. Merriam, that payment of these notes will be required as they mature.

Yours truly,

CHAS. A. LYERLY, President."

Rec. p. 23.

And the notes were accordingly paid eventually by Thomas Merriam.

Rec. pp. 21-22.

This would seem to be sufficient to put him on notice that at that time his brother's creditors were looking to him, and not to I. B. Merriam, for payment of obligations on which his name appeared and he seems to have recognized the futility of even requesting his brother to pay them.

Thomas Merriam states that he was in Chattanooga in the spring of 1897, again in the spring of 1899, again in the fall of 1902, and several times during the spring of 1903. On several of these different occasions he was in his brother's place of business, and had an opportunity, at any rate, to see the conditions existing there. He also learned on the occasion of his first visit, in 1897, that the store building, constituting the most valuable portion of his brother's real estate in Chattanooga, was mortgaged to the extent of $10,000, and in the fall of 1902 he learned that his home was mortgaged, but he says he does not recall that he learned, or inquired the amount of the mortgage debt. On the occasion of this same visit he also learned that the mountain land was mortgaged to secure a debt of $4,000. He admits he was in the store on the occasion of his last visit to Chattanooga, in May, 1903, less than a month before the sale of the mountdin land, that he thought he saw one or two custo-

mers in there, that I. B. Merriam and a colored porter constituted the selling force, his brother's son was the sole occupant of the office, and the stock of goods seemed to be "a pretty light" one. He says, however, he did not know how much business his brother was doing except that "they said they were not doing a very large business."

Rec. pp. 151, 154, 157, 170, 172, 173.

He admits that he knew of a number of debts which his brother owed, but did not inquire, and did not know, as to the amounts of them. He knew that when his brother bought out Storey, in 1896, he borrowed $5,000 to make the cash payment to Storey, and gave notes for the balance of the purchase price; but he says he did not know anything about how much, if any, of this indebtedness remained unpaid in June, 1903, and it was none of his business.

Rec. pp. 166-167.

He also knew of some indebtedness to other persons, but says he did not know how much any of them amounted to.

Rec. pp. 176-177.

At the time of his first visit to Chattanooga, in 1897, he says I. B. Merriam told him that his

total indebtedness, including that to his brother, would not exceed $40,000.

Rec. p. 152.

On the other hand, I. B. Merriam says that in the spring of 1899 he told his brother that his indebtedness was between $85,000 and $100,000.

Rec. pp. 72, 68.

And this statement Thomas denies.

Rec. p. 154.

After the trade for the coal lands had been closed in Syracuse, and Thomas Merriam had appropriated something over $43,000 of the proceeds of sale in paying off the debts to himself and the Syracuse bank, with compound interest, there remained, as has already been shown, including the proceeds of the note of $3,300 which was discounted in Syracuse, about $25,000; and I. B. Merriam says that his brother Thomas turned this money over to him on the express condition that he would apply it in payment of obligations on which his brother Thomas was endorser. He says his brother told him:

". . . . . You take that money down there and pay off those notes with my name on it, and I said I would.

"Q. Did he not ask you to let him do it in the first instance?

"A. No, he said if I would do it he would be satisfied; if I said I would do it, he knew I would.

"Q. Otherwise he would do it?

"A. Yes sir; or send Mr. Robinson down there.

"Q. He proposed to send Mr. Robinson down there, did he?

"A. Yes, if I didn't pay off these obligations; and I said you know I will do it if I agreed to it, and he said all right.

"Q. And if you would not agree to it, he would send Mr. Robinson down to take up the paper?

"A. Yes sir."

Rec. p. 129.

See also Rec. p. 50.

Thomas Merriam denies this, and says he thought the amount of money his brother took away with him would pay everything he owed.

Rec. pp. 162-163.

It is significant in this connection, however,

that it took all of this money except $3,000 or $4,000 to pay off the liens on the land, and the notes on which Thomas Merriam's name appeared; that it was in fact so used; and that I. B. Merriam owed other debts at the time, of the existence of which Thomas Merriam admits he was aware although he says he was ignorant of the amounts of them, *which in fact aggregated over $24,000;* namely, the Storey debt, of $9,250, the Brown Banking Co. debt $5,737.98, the Mrs. Vann debt $6,655 and the Gus Cate debt $2,891. Besides these, he knew of the mortgage debts on the store building and on I. B. Merriam's home, but says he did not know what they amounted to. It is further significant that *as soon as he had completed the disbursement of the money he had brought with him from Syracuse, I. B. Merriam filed his petition in bankruptcy.*

If the testimony of I. B. Merriam is to be believed, Thomas Merriam had not only cause to believe, but actual and positive knowledge, that his brother was insolvent, that the coal land was practically the only source to which his unsecured creditors could look for payment of their debts, and that the appropriation made by him of the proceeds of the sale of this coal land would necessarily result in inability to pay the other creditors. If he knew that I. B.

Merriam owed between $85,000 and $100,000 in 1899, he had no reason to suppose that his condition was any better in 1903, for during that interval he had not been able to pay a single cent,either of principal or interest, on the large indebtedness payable to, or endorsed by his brother. And the fact that he had this knowledge of his brother's indebtedness, coupled with the fact as testified to by I. B. Merriam that Thomas insisted that the notes on which he was endorser be paid out of the money which I. B. took to Chattanooga from Syracuse, is almost conclusive evidence that Thomas knew there was not enough money to pay all the indebtedness and intended to obtain preference for those on which he was bound.

But if we disregard the testimony of I. B. Merriam entirely, we submit that that of Thomas Merriam shows that he had ample cause to believe that his brother was insolvent. When he was in Chattanooga in the fall of 1902 and the spring of 1903, the record abundantly shows that the condition of I. B. Merriam was notorious. His stock of goods had dwindled to a mere remnant of unsalable articles that nobody wanted, and whenever he received an order he had to go out and buy the goods from other dealers with which to fill it. He was in default in the payment of taxes and insurance,

in both interest and principal on his mortgage debts, his house had been sold for taxes and the period for redemption had almost expired; lawyers were besieging him daily with claims to collect, and suits before justices of the peace on undisputed claims were matters of common occurrence; the banks would no longer accommodate him, and merchants and brokers in his own city refused to sell him except for cash. This was the situation—open, manifest and notorious—when Thomas Merriam visited his brother in November, 1902, February, 1903 and May, 1903, and stayed at his house and visited at his store. He knew that his brother owed debts on which he was himself either payee or endorser, to the amount of about $60,000; he knew that both his store building and home were encumbered; he knew that even his coal land was mortgaged to the extent of $4,000; and he saw enough to disclose to any reasonable man that the wholesale grocery business had become a farce. And on the occasion of these visits, Thomas Merriam was endeavoring to effect a sale of the interest in the coal lands which had for years constituted the basis of credit which had enabled his brother to keep going, and when the sale was effected practically the entire proceeds went to the benefit of Thomas Merriam. It is submitted that in

view of the relationship between the parties, their intimate and long continued dealings with each other, and the facts which Thomas Merriam admits he knew, leaving out of consideration entirely the controverted and disputed testimony, there is ample evidence to sustain the conclusion that Thomas Merriam had reasonable cause to believe that he was obtaining a preference in the application which was made of the proceeds of the coal lands, and that it was intended as such.

But we submit, further, that the greater weight should be given to the testimony of I. B. Merriam, in all cases where there is any conflict between his testimony and that of his brother. Every consideration and inducement which would ordinarily influence a witness would move I. B. Merriam to favor and protect his brother in his testimony so far as it was possible for him to do so; and the record abundantly shows that he was a most unwilling witness to any fact detrimental to his brother's interest, and a very swift one as to anything he thought would help him. On the other hand, we think the Circuit Court of Appeals is fully justified in the opinion expressed by them that the testimony of Thomas Merriam is "neither full nor frank;" and aside from that, and all other things being equal, his interest in the case

is such that his testimony is not entitled to as much weight as that of a disinterested, or less interested, witness.

In addition to the testimony of Thomas Merriam himself, the appellants took the depositions of Mrs. Ernhout, a sister of the Merriams, and her daughter Miss Merriam Ernhout.

Rec. pp. 191-194.

These witnesses testify, in substance, that before I. B. Merriam left Syracuse to return to Chattanooga, on June 1st, 1903, he expressed himself as much pleased with the manner in which his brother had treated him, and that "he didn't think he would have any difficulty in paying his debts, all of his debts, and keeping his home. *He said of course he couldn't do it at once*, but he had property to sell which he thought would bring enough to pay all his indebtedness, if they would give him time, *but he couldn't do it just then*, but he felt certain he could pay every debt."

Test. Mrs. Ernhout, Rec. p. 191.

After his first interview with Thomas Merriam "he had seemed rather blue," but after a subsequent interview "he seemed more cheerful, and he said yes, *he thought he would have enough to settle part of his debts there* and that if a

little time were given him he could settle all his debts and he would be all right. He said he had land in Chattanooga that he could sell, *he thought,* and with that and the money he had he could settle his debts and save his home, and he spoke then of going on with his business, I suppose his grocery business."

Test. Miss Merriam Ernhout, Rec. p. 193.

On cross-examination, when interrogated further about her uncle's apparent mental condition, Miss Merriam testified as follows:

"A. Why he seemed worried; I suppose any one would be in a similar postion.

"Q. Why do you suppose that?

"A. I know the way I should feel myself.

"Q. Had you heard the matter of your Uncle I. B. Merriam's financial condition discussed in the family?

"A. Why I have heard it spoken of, but I never paid much attention.

"Q. Had you heard that your Uncle I. B. Merriam, down in Chattanooga was considerably involved?

"A. Why, yes, I knew that he was probably

in debt or in trouble. I didn't know anything else about it.

"Q. And very hard up?

"A. Why, yes."

Rec. pp. 193-194.

It is hardly possible, in view of their relations with each other, that Thomas Merriam did not have more definite knowledge of his brother's condition than these two witnesses; for it is evident that I. B. Merriam was trying to keep up his spirits when with his sister and niece, and to take, and impress on them, the most hopeful view of the situation which the circumstances admitted of. Yet if Thomas Merriam knew *even as much* as these two witnesses did, he knew that his brother was heavily involved, "very hard up," that he did not have money enough to pay all his creditors, and tha only hope of getting out of debt was in his being able to sell his mortgaged real estate for satisfactory prices. In other words, Thomas Merriam knew that *while he was getting all his debts paid in cash, the other creditors were left to take the chances of this encumbered real estate, which I. B. Merriam had been carrying for nearly twenty years without being able to sell it, bringing enough to pay their debts.*

And yet Thomas Merriam told another witness that when his brother started to Chattanooga, to pay off the debts on which Thomas was liable, and to tell his other creditors they would have to wait until he could sell his real estate, "he was as merry as a lark, and as happy as a clam and he was going home feeling splendidly"!

Test. Robinson, Rec. p. 186.

Truly it takes but little to make some people happy.

It may be that both the Merriams hoped, or even believed, that in some miraculous way I. B. Merriam would be able to drift along and eventually pay all his debts. What they, or either of them, *actually* hoped or believed is immaterial. They knew that the necessary effect of appropriating the proceeds of the coal lands to the payment of Thomas Merriam's debts was to relegate the other creditors to the encumbered Chattanooga real estate. Even if it was uncertain whether this real estate would pay the other debts Thomas Merriam knew he was getting a preference, because his debts were being actually paid in full, while payment of the others were left to depend upon an uncertainty; but we submit that from the facts that were actually known to both I. B. and Thomas Merriam

no other reasonable conclusion could be reached than that it would be a practical impossibility to pay all the other indebtedness out of the remaining property.

III.

THE MORTGAGE IN FAVOR OF THOMAS MERRIAM.

The answer to the petition in this case avers that during the summer of 1897 I. B. Merriam executed *and delivered* to the trustee therein named a deed of trust conveying his interest in the coal lands in question "for the sum of twenty-five thousand dollars, which trust deed was executed, delivered and accepted as and for *complete and continuing security* to this defendant for any and all sums of money *which he might loan*" to I. B. Merriam, as well as "for any liability which he might incur by reason of endorsing notes or other commercial paper for said I. B. Merriam;" and that on or about April 11th, 1899, I. B. Merriam executed and delivered another trust deed to secure Thomas Merriam for any endorsement he might make for I. B. Merriam, and any money he might loan him, to the amount of $35,000.

Rec. p. 15.

It was shown in the proof, however, that

only mortgage ever given by I. B. Merriam was one dated *September 24th, 1897*, purporting to secure an indebtedness of $35,000 due one year after date. This deed of trust showed on its face that the amount of indebtedness mentioned in it had been changed from $25,000 to $35,000, but there was no evidence as to when or why the alteration was made. It also showed other alterations which we do not deem it necessary to discuss, inasmuch as the original instrument seems not to have been sent up from the Circuit Court of Appeals. On the hearing, on affidavit of defendant's attorneys, they were allowed to amend the answer with respect to this mortgage so as to make its allegations conform to the proof. The lower Courts both held that this mortgage was not given or accepted in good faith, and that it did not constitute a valid lien or encumbrance on the property described therein as against the trustee in bankruptcy. It is contended in this Court that this holding was erroneous because in the first place the *bona fides* of the deed of trust was not in issue under the pleadings, and because in the second place, the evidence does not justify the conclusions reached.

1. *The Pleadings.*

It will be observed that whatever may have

been the original effect or validity of this deed of trust, it was, at the time the petition in this case was filed, no longer a subsisting or operative instrument. It had become *functus officio;* the land which it undertook or purported to convey had been sold and the proceeds of sale paid out; and there was no occasion or necessity for the trustee, even if he had known of it, to invoke the aid of the Court to set it aside, for it had already become inoperative. What the trustee complained of was the consummated transaction; the sale of the land and the appropriation of its proceeds to give a preference to Thomas Merriam; and it was not incumbent on him to anticipate the defense that Thomas Merriam had a right to make the appropriation by virtue of a deed of trust which he held on the land, even if he had known that any such deed of trust ever existed, which he did not and could not know. The fact that he held a valid deed of trust on the land might justify the appropriation of the proceeds of sale made by Thomas Merriam; but it would be matter of defense to be alleged and proven by the defendant. It is quite conceivable that there might have been a number of conveyances by I. B. Merriam in favor of his brother, each covering the same land, and each superseding the preceding one, and the last one itself being dis-

charged and superseded by an absolute conveyance by the mortgagor to the mortgagee, such as was made in this case; and there would be just as much reason, as we submit, in contending that it would be necessary for the trustee to attack specifically each one of such conveyances, as there is to contend that he must specifically attack the deed of trust disclosed in the proof, although it constituted no encumbrance whatever on the property when he filed his petition, and although he sought no relief against it.

The theory of a suit to reach property fraudulently conveyed, or its proceeds "is not to annul the deeds and revest the title in the original fraudulent grantor, but to convert the *final fraudulent grantee* into a trustee, holding for the benefit of the injured creditors. . . . .

"Under any ordinary circumstances, therefore, there can be no good reason for bringing in other parties beside the fraudulent grantor and the grantee *in whom the title has become vested.*"

Stout vs. Stout, 77 Ind., 537,539-540.

And although a bill filed by a creditor attacks a number of conveyances made by the debtor, there is really but one cause of action stated,

"which is an equitable suit to reach equitable and other interests really belonging to the judgment debtor,and to set aside fraudulent conveyances *and obstructions* to a levy and sale on exetion."

Marsten vs. Dresen, 76 Wis. 418, 420.

In this case, the deed of trust in question constituted no "obstruction" in the way of the trustee when he brought his suit. He made out a *prima facie* case when he proved the payment, made when the debtor was insolvent, within four months of the filing of the petition in bankruptcy, and reasonable cause, on the part of the person receiving the payment, to believe that it was intended thereby to give a preference. If the creditor receiving the payment, in order to avoid the apparent preference, relies on an unregistered instrument, unknown to the other creditors or the trustee, and which had confessedly become inoperative before the suit was brought, we submit that the lower Courts were correct in holding that this was defensive matter, in the nature of a confession and avoidance, which the defendant must set up and establish.

The distinction between this case and those cited in appellant's brief on the proposition that the pleadings are not sufficient to justify any impeachment of the mortgage, seems to us

obvious. If in a suit to collect a debt the defendant pleads a release, accord and satisfaction, or compromise; or if in a suit a suit to recover land, the defendant sets up *a subsisting* deed, showing title in some third person; it is probably true that if the plaintiff admits the existence of such obstructions to his right of action, but maintains that they are invalid for fraud, accident, mistake or any other reason, he should amend his pleadings so as to present the necessary issues. But if the defendant sets up a *dead* or *obsolete* instrument, to show the validity of a present and subsisting claim,the fact and validity of such instrument are mere matters of evidence; and as we have already suggested, it is not necessary for the plaintiff to file any pleading attacking the instrument, for, whatever its effect may once have been, it cannot, after it has been discharged, constitute any obstruction between the plaintiff and the property which he is seeking to reach.

2. *The Facts.*

Does the evidence sustain the findings of the lower Courts that the mortgage in question was not made in good faith, or intended as a valid and operative security? Or, to put the question in the form in which it will be considered in this Court—Is the concurrent conclu-

sion of the lower Courts on this point clearly erroneous?

The testimony shows that the mortgage was executed on September 24, 1897. It was drawn, not by the attorneys in Chattanooga who had represented I. B. Merriam and his co-tenant Jarnagin with reference to these lands for a number of years, or by any attorney representing Thomas Merriam, but by a lawyer in the remote mountain hamlet of Crossville, in the Cumberland Mountains. I. B. Merriam says of this lawyer, Mr. Dorton.

"He was not my attorney at all, but I explained it to him, and he drew the mortgage."

Rec. p. 147.

The bankrupt says in one place, in answer to a question whether he gave the mortgage at the instance or request of his brother or voluntarily,

"*I did it voluntarily*, to give him security on what I owed him."

Rec. p. 73.

A little later in his examination he says: "My brother wanted security . . . . . and I gave it to him in order to help me carry these matters along . . . . . *He wrote and asked me for it.*"

Rec. p. 146-147.

After the mortgage had been executed I. B. Merriam kept it until April, 1899, in the safe at his store. At that time his brother was in Chattanooga, and the mortgage was taken from the safe and shown to him, and was then turned over to Thomas Merriam, Jr., son of I. B. Merriam, who was the trustee named in it, and who after that kept it in his trunk, in I. B. Merriam's house.

At the same time that the mortgage was executed, I. B. Merriam executed and sent to his brother a note for $35,000. He was asked whether the note represented the principal of the amount he then owed his brother or was intended as collateral security, and he says:

"A. It was intended as collateral security.

"Q. Was the trust deed given to secure this note as collateral security?

"A. Yes sir.

"Q. Has that trust deed ever been put of record?"

"A. No sir.

. . . . . .

"Q. It was agreed that *you should hold* the trust deed and that it should not be put of record until such time as your brother might demand for his protection?

"A. Yes sir."

Rec. pp. 74-75.

And again:—

"Q. What did he say about putting that mortgage of record?

"A. At that time he said that whenever he demanded that it should be put of record that I should do so. *He agreed not to put it of record unless he felt that necessity required it.* He came down here two years ago and got the mortgage and put it in the hands of my son."

Rec. p. 147.

That the existence of the mortgage was studiously concealed by I. B. Merriam; that he represented to his other creditors that the coal land was unencumbered, that he was expecting constantly to make a sale of it, and that when he did sell it he would pay all his debts; and that these statements induced his creditors to refrain from pressing their claims, and enabled him to keep going for years longer than he could otherwise have done—are all facts overwhelmingly established by the record.

Test. H. B. Case, Rec. p. 26;

Test. R. T. Wright, Rec. p. 31;

Test. Robert Pritchard, Rec. p. 37;

Test. Ernest Scholze, Rec. p. 44;

Test. T. G. Montague, Rec. p. 199;

Test. A. D. Storey, Rec. p. 208;

Test. N. Dietzen, Rec. p. 213;

Test. Byron E. Tatum, Rec. p. 234.

In fact on his first examination by his creditors, before the petition in this case had been filed, I. B. Merriam swore positively *that there was no other mortgage on the land than the one for $4,000 in favor of the Chattanooga Savings Bank.*

Rec. pp. 114-115.

It is true that I. B. Merriam says in his testimony that he had told G. H. Jarnagin, his cotenant, and T. G. Montague, the President of the First National Bank of Chattanooga, about the mortgage to his brother; but this is denied both by Mr. Jarnagin and Mr. Montague.

Test. Jarnagin, Rec. p. 222;

Test. Montague, Rec. p. 199.

In November, 1902, I. B. Merriam and G. H. Jarnagin executed a contract by which they agreed to sell this coal land to Thomas Merriam and W. Herbert Robinson on certain stipulated

terms. We will discuss this contract more particularly later on. At or about the same time that this contract was executed, a deed was made conveying the same property, in which the name of the grantee was left blank; and the attorneys who drew this contract and deed, who had also represented Messrs. Merriam and Jarnagin with reference to this mountain land for a number of years, were requested to furnish to Thomas Merriam and Mr. Robinson an abstract of the title to the land. This abstract was furnised accordingly, and it concluded with this statement:

"Messrs. Merriam and Jarnagin inform us that *the only encumbrance or lien* against these lands now outstanding is an indebtedness of $4,000 in favor of the Chattanooga Savings Bank, secured by a deed of trust on said lands."

By this abstract Thomas Merriam was informed, if he had not known it before, that I. B. Merriam had kept the existence of the deed of trust in his brother's favor so well concealed that even his attorneys and his co-tenant knew nothing of it.

When I. B. Merriam went to Syracuse and closed the trade with his brother for this mountain land, and made the appropriation of the proceeds of sale of which the trustee is

complaining in this case, the mortgage now in question *was not discussed or referred to in any way.* The last time it had been spoken of prior to that was on one occasion when there seemed to be some doubt about the deal for the land going through, and Thomas Merriam said if it did not go through he wanted the mortgage put on record and I. B. agreed to do it.

Rec. p. 131.

The settlement between the bankrupt and his brother was made on June 1st, the petition in this case was filed by the Trustee on June 26th and the answer of Thomas Merriam was filed on August 1st; and at the time this answer was prepared Thomas Merriam *had so far forgotten* the facts regarding this mortgage that he wholly misstated them to his attorney.

If the transaction of June 1st, 1903, was intended as a foreclosure of the mortgage of September 24, 1897, as is now insisted, it is incomprehensible that Thomas Merriam could, when his answer was prepared, less than two months later, have entirely forgotten even the date and amount of the mortgage, or that his recollection thereof should be so utterly at variance with the facts.

On the facts hereinbefore stated and others

referred to in the opinion, the Circuit Court of Appeals concludes as follows:

"Now was it intended that this mortgage should at once become an existing specific lien upon the lands described therein from and after September 24, 1897, for the sole and single purpose of securing the debt then due and advances thereafter to be made, an intention to make such further loans being in no way disclosed, or was it intended as a prospective security to become effective as such by registration at such time as the interests of the beneficiary should require?

"That it was not intended to become effective when made and dated is plain from the fact that it was not delivered for perhaps two years, and when it was placed in the hands of the trustee, the bankrupt's son and partner, it was subject to the agreement against registration.

"If the meaning of what then occurred was that the instrument was to be held by way of escrow, becoming effective as a specific lien only in the event the affairs of I. B. Merriam should get into such a situation as to require the protection of his brother by putting this agreement for a mortgage into effect as a specific lien, there would be no reason for claiming that it ever came into effect prior to June 1,

1903, and then only as a consequence of an agreement of the parties then made. That it was the purpose of the parties that it should only go into effect as a lien when registered is most consistent with the conduct of the parties and this was the conclusion of the Court below and in this we are disposed to concur."

Rec. p. 290.

And the Circuit Judge held:

"On this evidence . . . . I am satisfied that this mortgage if originally intended to have been effective and to continue constantly a fixed charge upon the property, had been, in fact abandoned.

"But on the contrary, looking at these facts and circumstances in the light of reason and of our experience, my opinion is that the mortgage was executed and withheld from registration with a view not to make it a lien upon the the land unless as already indicated suspension of business and winding up should become necessary.

"It was in all probability thought withholding it from record would enable the vendor to still continue his business, and that this apparently unencumbered tract of land would, of course, furnish large ground for the extension of such

credit to him as would be necessary. It was probably what was thought to be a sort of method of 'hoping for the best and providing for the worst' as regards the interest of the favored brother."

Rec. p. 263.

Are these concurrent holdings of the lower Courts clearly erroneus? On the other hand, are they not the most logical and proper conclusions that could be drawn from the facts proven? We might concede for the sake of the argument on this proposition, that the withholding of the mortgage from record is no evidence of fraudulent intent on the part of either mortgagor or mortgagee, although the authorities are to the contrary; it is certainly, at all events, significant and important evidence on the question whether the mortgage was intended to take effect when executed, or only, to use the language of the parties themselves, when "necessity required it." And when to this withholding from registration we add the fact that I. B. Merriam repeatedly stated to his creditors and others down to the date of the sale to his brother that the land *was unencumbered* save by the mortgage to the bank; knowledge brought home to Thomas Merriam in November, 1902, that his brother was so representing and that even the lawyers who prepared the

abstract and I. B. Merriam's co-tenant had never heard of this mortgage, and acquiescence in the truth of his brother's representation on the part of Thomas Merriam by failure to object to or correct it when brought to his attention; the failure to mention the mortgage in any way when the final settlement was made: and the remarkable lapse of memory as to the facts of the mortgage displayed by Thomas Merriam when he came to prepare his answer—we submit, as we say, that the conclusion arrived at by the lower courts is not only not "clearly erroneous," but was the only one that could be justly reached. If I. B. Merriam told the truth when he represented to his creditors that the only encumbrance on the land was that in favor of the Chattanooga Savings Bank, then the mortgage in favor of his brother was not a valid, subsisting instrument; and the failure of Thomas Merriam to challenge the statement when it is brought to his attention justifies the assumption that he admitted and recognized the truth of it.

If the conclusion of the lower courts on this point is correct, then it is wholly unnecessary to consider whether the trustee in bankruptcy could successfully impeach this mortgage for fraud, in view of the fact that there are no creditors having judgments or other liens on

the property. The trustee has not undertaken to attack the mortgage, and, as we have already argued, it was not necessary for him to do so. The defendant undertook to rely on it to justify a payment by the bankrupt that was otherwise preferential, and the proof shows that mortgage was not, and was never intended to be, a valid, subsisting, operative security. Therefore the defense relied on has failed, and the judgment of the Courts below should be affirmed.

3. *The Legal Effect of an Unregistered Mortgage.*

But suppose there were no question of fraud in the case; suppose it had been established that the mortgage was given and taken in good faith, and that it had never been discharged or satisfied up to the time of the filing of the petition in bankruptcy; what would be its legal status and effect as against the trustee in bankruptcy?

(a.) It will be observed that this mortgage *never was registered at all;* and the statutes of Tennessee provide that while conveyances of land shall have effect between the parties, their heirs and representatives without registration, they take effect as to other persons, not having actual notice of them, only from their registration; and that without registration they are

"null and void as to existing and subsequent creditors of, or *bona fide* purchasers from, the makers."

Shannon's Code, §§ 3751, 3752.

It is true the Supreme Court of Tennessee has held that only judgment or other lien creditors can successfully impeach or defeat an unregistered deed or mortgage, for the reason that until their claims are reduced to judgment, or until they have fixed a lien on the land, their *status* as creditors is not established; and registration of a conveyance at any time before a lien is fixed on the land by creditors of the grantor is valid and effective. But on the other hand, it is held that where a mortgagor dies before the registration of the mortgage, and his estate is insolvent, the mortgage is void and unenforcible under certain statutory provisions as follows:

"Insolvent estates of deceased persons shall be divided among the creditors ratably, and no action brought, judgment, bill single or note shall have precedence over unliquidated accounts, presented and filed, authenticated according to law; but all such claims shall be acted upon as being of equal grade."

"The suggestion of insolvency and advertisement thereof shall operate as an injunction in

all cases against the bringing of any suit before any jurisdiction whatever against the administrator or executor of such insolvent estate."

Shannon's Code, Secs. 4065, 4072.

The ground on which this holding is based is that the statute breaks down all distinction in the dignity of debts and treats all as of equal importance; that the suggestion of insolvency in effect makes every creditor whose debt or claim is properly authenticated "a *quasi* judgment creditor," and precludes the mortgage creditor from the perfection and enforcement of his mortgage.

Henderson vs. McGhee, 6 Heisk., 55.

Yet the same Court has held that these statutes do not effect liens, either equitable or legal, acquired *and perfected* during the lifetime of the debtor, and that it is only what remains after the discharge of the liens or encumbrances which goes into the fund for distribution. But the statutes were intended to effect liens *not fixed* during the lifetime of the debtor, or before the suggestion of his insolvency; their object being "to *prevent* the ripening or fixing of liens after the death of the debtor."

Bacchus vs. Peters, 85 Tenn., 678, 680-681.

It necessarily follows, from these decisions, that an unregistered mortgage is not, under the laws of Tennessee, a fixed perfected lien, such as will be operative against the rights of the *general* creditors to a *pro rata* distribution of an insolvent estate.

The purpose of the bankrupt law is precisely the same as that of the laws of Tennessee relative to the winding up of the insolvent estates of decedents; namely, to secure a ratable and proportionate distribution of the assets among all the creditors. The inhibition of the bankruptcy act against the fixing of liens, whether by the voluntary act of the debtor or through legal proceedings, so as to prevent an equal distribution of the debtor's property, is at least as positive and definite as that in the State statutes, and the exceptions made by the bankruptcy law in favor of liens which have become fixed and perfected before the bankruptcy are certainly no more liberal or favorable to the creditors claiming priority than those made by the State law.

The statutes of Tennessee provide that the suggestion of insolvency and advertisement there of shall operate as an injunction against the bringing of any suits against the representative of the insolvent estate; and this Court has held

that the filing of a petition in bankruptcy, followed by an adjudication, is a *caveat* to all the world and *in effect an injunction and attachment*; and that the effect of the bankruptcy is to render the bankrupt for many purposes *civiliter mortuus*.

Bank vs. Sherman, 101 U. S. 403,406;

Mueller vs. Nugent, 184 U. S., 1, 14.

See also—*Chesapeake Shoe Co. vs. Seldner*, 122 Fed., 593;

In Re Breslauer, 121 Fed., 912;

In Re H. G. Andrae Co., 117 Fed., 564.

In other words, the general scope, purpose and effect of the Tennessee insolvency law, as construed in *Henderson vs. McGhee, supra*, and of the Bankruptcy Act of Congress, as construed by the Federal Courts are practically identical; and therefore if an unregistered mortgage would not be operative or effective under the State insolvency law it would seem to necessarily follow that it would be equally inoperative under the Bankruptcy law.

(*b.*) And furthermore; Section 70, a (5) of the bankruptcy act vests title in the trustee to

all property which prior to the filing of the petition the bankrupt *"could by any means have transferred or which might have been levied upon and sold under judicial proceedings against him."* It cannot be denied, and indeed is conceded in brief for appellants, that the unregistered mortgage would not have prevented a transfer by the mortgagor of the property included therein to an innocent purchaser, and that it would have constituted no obstacle against a levy and sale of the property under judicial proceedings against the mortgagor. Therefore if the mortgage had been subsisting but unregistered at the date of the filing of the petition, the title to the property in controversy would have vested in the trustee, notwithstanding the mortgage, by the express terms of the statute.

It is respectfully submitted, therefore, that regardless of any question of fraud or good faith if the mortgage in question had been outstanding, but unregistered, at the date the petition in bankruptcy was filed, it could not have been enforced by the mortgage creditor, and the title to the property embraced therein would have passed to the trustee in bankruptcy; and the fact that such a mortgage had been in existence more than four months prior to the bankruptcy would constitute no defense or justification of a payment otherwise preferential.

IV.

THE CONTRACT OF NOVEMBER, 1902

It is next contended by appellants that on November 15, 1902, a contract was made between I. B. Merriam and Thomas Merriam by which the latter contracted to purchase the coal lands in question, for the specific purpose of securing payment of his own debts and those on which he was endorser for his brother; that the delivery of the deed on June 1st, 1903, "was simply the consumation of the contract of November 15, 1902, which fixed the rights of the parties;" and that therefore the preference, if there was one, was given more than four months before the bankruptcy and is not subject to attack by the trustee.

If the facts were as assumed in this argument, we submit that the legal proposition contended for is not sound. This precise question was involved in the case of *In Re Great Western Mfg. Co.*, 152 Fed., 123, decided by the Circuit Court of Appeals for the Eighth Circuit in March, 1907. In that case, it was contended that a mortgage, given when the mortgagor was insolvent and within four months prior to the filing of a petition in bankruptcy against it, was nevertheless good because made in pursuance

of a valid agreement to give it which antedated the four months. But the Court said:

"An agreement to mortgage or to transfer is not a mortgage or a transfer. The title remains in the owner unencumbered by the mortgage until the mortgage or transfer is effected. When the agreement is made before, and the mortgage or transfer within, the four months, the title stands unencumbered by the latter at the commencement of the four months, and the proceeds of that title are pledged under the bankruptcy law for the benefit of all the creditors pro rata. Any subsequent mortgage or transfer withdraws that title or a portion of its value from these creditors, and a just and fair interpretation and execution of the act demands that such a mortgage or transfer should be adjudged voidable if it is otherwise so, and that the mortgagee or transferee should be remitted to his original agreement. In this way the property at the commencement of the four months and its value may be preserved for the general creditors, and the mortgagee or transferee may retain every lawful advantage his earlier contract confers upon him. Any other course of decisions opens a new and enticing way to secure preferences, nullifies every provision of the law to prevent them, and invites fraud and perjury. Hold that transfers within

four months in performance of agreements to make them before that time do not constitute voidable preferences, and honest debtors would agree with their favored creditors before the four months that they would subsequently secure them by mortgages or transfers of their property, and just before the petitions in bankruptcy were filed they would perform their agreements. Dishonest men who made no such contracts might falsely testify that they had done so and thus by fraud and perjury sustain preferential transfers and mortgages made within the four months to relatives or friends. The great body of the creditors would be left without share in the property of their debtor and without remedy, and a law conceived and enacted to secure a fair and equal distribution of the property of debtors among their creditors would fail to accomplish one of its chief objects."

152 Fed. 127.

In the present case, however, there never was, as a matter of fact, any contract *to purchase* this land made on November 15, 1902, or at any time prior to the actual sale which was made on June 1st, 1903; neither was there any agreement prior to June 1st, 1903, so far as the record shows, that Thomas Merriam should

apply the proceeds of the coal lands in satisfaction of his debts and those on which he was endorser.

It will be noticed that the version which defendant gives in his answer of this so-called contract of November, 1902, is as follows:

"That during or about the month of December, 1902, defendant entered into an agreement with said I. B. Merriam by the terms of which this defendant was to *enter into possession of said premises and negotiate the sale of the same if possible*, and out of the proceeds of sale first pay himself the amount due for money loaned and take up such paper as he was liable on as endorser and for all of which he was secured by the trust deed aforesaid."

Answer, Rec. p. 15.

As a matter of fact there is not even an effort to prove any such contract as is alleged in the answer. No witness pretends to say that it was any part of the contract made in November, 1902, that Thomas Merriam should "enter into possession" of the coal lands, or that his debts should be first paid out of the proceeds of the sale thereof. On the contrary, I. B. Merriam testifies that when he went to Syracuse about June 1st, 1903, to close up the trade he ex-

pected to bring back with him much more money than he got, because he expected to get further time on the larger part of the indebtedness due to his brother, and on which his brother was surety.

Rec. p. 127-128.

The facts about this alleged contract of November 15, 1902, are that on that date a writing was signed by I. B. Merriam and G. H. Jarnagin on one side and Thomas Merriam and W. Herbert Robinson on the other, whereby the first named parties agreed to sell to the two last named the Cumberland County coal lands in question for the sum of $150,000 payable on the terms therein stated.

Contract, Rec. pp. 18-19.

We may concede that this would have constituted a binding contract of sale and purchase, *if it had been intended to operate as such and had been formally delivered;* but as a matter of fact it was not intended to become binding at the time it was signed, *and it never became operative and was never performed.* At the same time that the contract was signed a deed in conformity with its provisions was also drawn up and executed by Merriam and Jarnagin, the name of the grantee therein being left blank; and the deed

and contract, together with the abstract of title to the lands *were all deposited in escrow* in a bank in Syracuse, to be delivered to Thomas Merriam on performance of certain conditions.

Test. G. H. Jarnagin, Rec. p. 220.

And so it is that this apparently absolute contract was in fact nothing more than *an option,*and is uniformly referred to as such by the witnesses.

Test. Thomas Merriam, Rec. pp. 157, 158;

Test. I. B. Merriam, Rec. pp. 81-82;

Test. Herbert Robinson, Rec. pp. 182.

And that all the parties knew and recognized that Thomas Merriam and Mr. Robinson were not obligated to purchase these lands on the terms stated,or indeed on any terms, unless they chose to do so, is fully evidenced by the fact that when the sale was made it was on terms entirely different from those set forth in this contract. Mr. Jarnagin got $45,000 cash and $20,000 in stock for his interest in the land, while Mr. Merriam got $65,000 cash and $20,000 stock.

Rec. pp. 220, 221, 111, 159, 185.

And the reduction in price was made because

Thomas Merriam notified his brother *that otherwise he could not carry the deal through.*

Test. Thomas Merriam, Rec. p. 175.

It is submitted, therefore, that the transaction of June 1st, 1903, can derive no support and acquire no additional validity because of this agreement of November 15, 1902. Even if this paper was originally operative as an absolute contract of sale and purchase, it does not lie in the mouth of Thomas Merriam or his legal representatives, after he has failed to perform it and refused to be bound by it, to now come forward and assert its validity, in the effort to sustain an otherwise illegal transaction.

V.

PARTNERSHIP AND INDIVIDUAL CREDITORS

In reply to the contention that the lower Courts were in error in failing to distinguish between the creditors of Merriam & Son and I. B. Merriam individually, we have already shown that according to the testimony of I. B. Merriam, the only witness on the subject, he was the sole owner of the business of Merriam & Son, and there was no other person than himself liable or responsible for its debts. There was in fact, therefore, no legal distinction be-

tween the rights of those persons who had extended credit to I. B. Merriam in his own name and those who had extended credit to him under the name of Merriam & Son; and of course the Courts could make none.

Furthermore, it was held in the case of *Eau Claire Nat'l Bank, vs. Jackman*, 204 U. S., 522, that the right of the trustee in bankruptcy to recover property obtained in fraud of the bankruptcy act was not affected by the question how the property would be administered among the different classes of creditors. This Court, in its opinion in the case, quotes from the opinion of the State Supreme Court as follows:

"The action . . . . . is simply one of trover to recover the value of property which, as is alleged, was, in fraud of the bankrupt act, wrongfully converted by defendant to its own use. Whether there was one or more classes of creditors, and in what manner the property sought to be recovered would, if the suit were successful, be administered, did not vary in the slightest degree the legal rights of the plaintiff. If the property was obtained in fraud of the bankrupt act, plaintiff was entitled to recover the same, and this is the only question involved."

204 U. S. 536.

And in the same case it was held that the defendant would not be permitted to litigate with the trustee, in a suit of that kind, the validity of other claims against the estate of the bankrupt; which answers, we think, so much of the brief on behalf of appellants as undertakes to assail the validity of the claims of the First National Bank, the Brown Banking Company, and other creditors on the ground that they knew of the mortgage to Thomas Merriam and therefore could not complain of it. Moreover, this contention is not in accordance with the facts. The only persons whom I. B. Merriam says he ever told about this mortgage were T. G. Montague, the President of the First National Bank, and G. H. Jarnagin.

Rec. p. 75.

Mr. Montague says the information given him by I. B. Merriam was that Thomas Merriam *had the sale* of the coal property, and not that he had a mortgage on it.

Rec. p. 199.

And Mr. Jarnagin says he never heard of the mortgage until after I. B. Merriam's return from Syracuse.

Rec. p. 222.

We find no evidence in the record, and do

not think any can be found, that the Brown Banking Company had any knowledge of it whatever.

VI.

THE COSTS, EXPENSES AND ATTORNEYS' FEES

It will be understood that the lower Courts did not require the appellants to pay any expenses or attorneys' fees *in addition to* the amount of the illegal preference, but only that they should refund the preferential payment "to the extent necessary to the payment of claims, costs and expenses."

Opinion, Rec. pp. 291-292.

It developed, however, that the claims, costs, and expenses amounted to more than the preferential payment to Thomas Merriam; and therefore on the final hearing decree was pronounced against appellants for the total amount of the preference.

Decree, Rec. p. 353.

It is submitted that appellants have no just cause to complain of this decree. The title to the property of the bankrupt's estate which had been illegally appropriated by Thomas Merriam by means of the preferential payment

complained of vested in the trustee, by the express provisions of the bankruptcy act; and the trustee took title to this, and all other property of the bankrupt's estate, for the purpose of applying the same to payment of the debts of the estate in the following order:

(1) The actual and necessary cost of preserving the estate subsequent to filing petition;

(2) The filing fees paid by creditors in involuntary cases, and where property of the bankrupt, transferred or concealed by him, either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expense of such recovery;

(3) The cost of administration, etc., etc., and finally, the general creditors.

Bank Act of 1898, § 64b.

We submit therefore that the position of counsel for the trustee stated in their brief in the Circuit Court of Appeals, as quoted on pp. 91-92 of brief for appellants in this Court, is sound. It is a misstatement of the situation to say, as do counsel for appellants, that the effect of the holding is that the trustee may recover *not only* the amount illegally paid the creditor,

but counsel fees *in addition* thereto. What the trustee has contended for, and what the Courts below have held, is that the trustee is entitled to so much *of the illegal preference* as may be necessary to pay the expenses of the trustee, including his attorneys' fees, as well as the ascertained claims against the estate. The trustee has never contended that he was entitled to recover anything in addition to the illegal payment except taxable Court costs; and so have the lower Courts held.

It is most respectfully submitted that there is no error in the decree and judgment of the Circuit Court of Appeals in this case, and that all of the assignments of error should be overruled and the decree affirmed.

GEORGE D. LANCASTER,
ROBERT PRITCHARD,
Solicitors for Appellee.

WILLIAMS & LANCASTER,
PRITCHARD & SIZER,
Of Counsel.

PAGE v. ROGERS, TRUSTEE IN BANKRUPTCY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 39. Argued December 3, 4, 1908.—Decided January 4, 1909.

Where two courts have concurred in findings of fact in a suit in equity, this court will accept those findings unless clear error is shown. *Dun* v. *Lumbermen's Credit Association*, 209 U. S. 20.

A partner cannot be considered as solvent individually as distinct from his firm which is insolvent, when he is practically the only partner, and his associate, although nominally a partner, is in fact only an employé; and a preferential payment made from his individual estate may, under such circumstances, be recovered for the benefit of all his creditors.

A deed unrecorded and placed in escrow more than four months before bankruptcy and delivered within that period *held*, under the circumstances of this case, to be a preferential payment within the meaning of the bankruptcy law.

The amount of fees to which counsel for the trustee in bankruptcy is entitled is a matter for the bankruptcy court and in this case this court will not interfere with the amount fixed.

149 Fed. Rep. 194, affirmed on these points.

One compelled to surrender a preferential payment is entitled to prove his claim and receive dividends equally with other creditors, *Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356, and where the suit is in the bankruptcy court and it is practicable, as in this case, to ascertain the amount of the dividend to which he will be entitled, it can be fixed and deducted from the amount which he is compelled to surrender.

149 Fed. Rep. 194, reversed solely for this purpose.

THE facts are stated in the opinion.

Mr. Frank Spurlock, with whom *Mr. E. J. Page*, *Mr. Louis L. Waters* and *Mr. Foster V. Brown* were on the brief, for appellants.

Mr. J. B. Sizer, with whom *Mr. George D. Lancaster* and *Mr. Robert Pritchard* were on the brief, for appellee.

MR. JUSTICE MOODY delivered the opinion of the court.

This is an appeal in equity from a decree of the Circuit Court of Appeals for the Sixth Circuit. The suit was begun by the appellee, the trustee of the estate of I. B. Merriam, a bankrupt, against Thomas Merriam, to recover a preference alleged to have been received by the latter in violation of the bankrupt law. During the pendency of the suit the defendant died, and the executors of his will were admitted to defend. The plaintiff had a decree, which was affirmed by the Circuit Court of Appeals. There were findings of fact by the District Court, concurred in by the Circuit Court of Appeals. These findings, together with the undisputed facts, may be condensed and stated in narrative form.

I. B. Merriam had been engaged in business for some years as a wholesale grocer at Chattanooga, Tenn. On the first day of June, 1903, he was considerably indebted and insolvent, and the defendant knew it. Much the larger portion of his indebtedness was to his brother, the defendant, Thomas Merriam, or to persons holding claims which Thomas Merriam had guaranteed by indorsement or otherwise. I. B. Merriam then had no assets of much value, with the exception of an undivided half interest in certain coal lands situated in Tennessee. On that day he conveyed his interest in the coal lands to Thomas Merriam, who agreed to pay therefor $65,000 in money and stock of the par value of $20,000 in the Tennessee Lumber & Coal Company, a corporation, to which Thomas Merriam immediately sold and conveyed the land. The purchase money, after the deduction of $7,400, used for the purpose of extinguishing encumbrances on the land, in pursuance of an agreement made at the time, was mainly devoted to the payment of the debt then due directly from I. B. Merriam to Thomas Merriam, and to the payment of other debts of I. B. Merriam for which Thomas Merriam was liable. At the same time, and as part of the same transaction, Thomas Merriam caused to be advanced to I. B. Merriam $10,000 additional upon the pledge of his stock in the Tennessee Lum-

ber & Coal Company. The net result of the transaction was that I. B. Merriam received, as the consideration for the conveyance of his interest in the coal lands, $75,000 in cash and an equity of redemption of the pledged shares in the corporation. Of this $75,000, $61,000, by agreement, was applied either to the payment of the debt due to Thomas Merriam, or, on his demand, to the payment of debts for which he was liable. At the time of the conveyance and the making of the agreement stated Thomas Merriam had reasonable cause to believe that thereby his brother intended to give him a preference. The purpose and effect of the transfer was to give Thomas Merriam a greater percentage of his debt than could be obtained by other creditors of the same class. Indeed, the purpose and effect of the transfer was to pay Thomas Merriam in full and to exonerate him from all liability as guarantor, and its effect was to leave all other creditors with substantially nothing to meet their claims. Within a very few days after this transaction was completed I. B. Merriam filed a voluntary petition in bankruptcy, and was subsequently adjudicated a bankrupt.

Upon the foregoing statement of facts it is indisputable that Thomas Merriam received a preference to the extent of $61,000, forbidden by the bankrupt law, and that it could be avoided and recovered by the trustee. We do not understand counsel for the defendant as disagreeing with this conclusion. Conceding it, however, counsel urged with great earnestness that the findings of fact in the two courts below were erroneous, and we were invited to consider the evidence again in that view. But the rule is well established that where two courts have concurred in findings of facts in a suit in equity, this court will accept those findings, unless clear error is shown. *Dun* v. *Lumbermen's Credit Association*, 209 U. S. 20.

We are unable to discover any such error. On the contrary, every fact essential to constitute a preference was substantiated by the evidence. That being so we decline to subject to minute scrutiny the language of the court employed in discussing questions of fact. There is no reason for a review of

the evidence in detail. The Circuit Court of Appeals has reviewed it satisfactorily in a convincing opinion, and we do not feel called upon to repeat the discussion.

There, however, should be a brief reference to two contentions of the defendant, that the findings were influenced by erroneous views of the law. It is first said that there was error in law in confounding the individual debts of I. B. Merriam with the partnership debts of I. B. Merriam & Son, with the result that I. B. Merriam was found to be insolvent as an individual, while really he was solvent, as his individual assets exceeded his individual indebtedness. But there was no real partnership. I. B. Merriam & Son was simply the name under which I. B. Merriam conducted the wholesale grocery business. The son was only an employé, receiving a salary, and had no interest whatever in the business. All the assets were owned and all the debts were owed by I. B. Merriam alone.

It is further said that I. B. Merriam agreed in writing, on November 15, 1902, to convey the coal lands to Thomas Merriam in satisfaction of the debts due to him or for which he was liable. It is, therefore, argued that as the conveyance, on June 1, 1903, was in performance of this agreement, which antedated the bankruptcy proceedings by more than four months, it cannot be regarded as a preference.

The facts, however, do not raise the question which was argued. Upon a proper interpretation of the evidence we need not determine whether an insolvent debtor may make an agreement to convey a substantial portion of his assets to a favored creditor, keep that agreement secret for more than four months, and then execute it in fraud of the rights of his other creditors, in favor of a creditor who then has reasonable cause to believe that he is receiving a preference. *In re Broadway Savings Trust Co.*, 152 Fed. Rep. 152, and see *Wilson* v. *Nelson*, 183 U. S. 191.

What actually occurred was that a contract in writing was made in November, 1902, between I. B. Merriam and his co-owner, parties of the first part, and Thomas Merriam and an-

other, parties of the second part, whereby the parties of the first part agreed to sell and the parties of the second part agreed to buy the coal lands for a named price. Nothing whatever in this contract required that I. B. Merriam's share of the consideration should be paid to Thomas Merriam or on debts for which he was liable. Moreover, the contract and a deed which was drawn in pursuance of its terms were not delivered, but were deposited in escrow with a bank in Syracuse, N. Y., and never became operative instruments. Nothing more need be said of them, or of the question supposed to be raised.

When Thomas Merriam came to file his answer in the suit, he alleged, in substance, that several years before the conveyance, which has been referred to, and the adjudication in bankruptcy, which followed, I. B. Merriam had executed and delivered, for an expressed consideration of $35,000, a trust deed of the coal lands, which was intended to be a security to Thomas Merriam for loans which he had made or might make to his brother, up to that amount. This trust deed, as subsequently appeared by the evidence, was executed but not registered. A registration of the deed was not required by the law of the State of Tennessee to make it a valid instrument *inter partes*. The defendant therefore contended that so far as the payments from the purchase money of the coal lands were applied to the indebtedness secured by the trust deed they were payments for the extinguishment of a valid, subsisting lien upon the land, fixed upon it more than four months before bankruptcy, and therefore not a preference. It may be assumed, without decision, that the payment within four months of bankruptcy of a mortgage older than four months, and valid *inter partes*, though unrecorded, cannot be a preference. There is no such case here. The trust deed was not delivered unconditionally and the parties to it intended that it should go into effect as a lien only when it was registered, which was never done. The instrument, though actually written, was never delivered as a present, valid and subsisting obligation. It was executed and held in the possession of

the grantor to be delivered and to become operative as a conveyance at some future time, which never arrived. It was written and held ready for instant use, but never actually used until brought forward to excuse a payment which otherwise would be an unlawful preference. In other words, the paper was not as much as an unrecorded deed; it was not a deed at all. Such in effect was the finding of both courts below and we think it was warranted by the evidence. As has been said, the first reference to this paper was made by the defendant's answer, wherein it was alleged that the paper was a deed executed and delivered. The plaintiff's general replication put in issue at least the existence of the deed and no amendment to the bill was needed.

The alternative ruling that the trust deed was invalid for want of good faith, and because it was agreed to be withheld from record to mislead and defraud creditors, may be disregarded. Therefore we need not consider whether the bill should have been amended to permit an attack on the deed as fraudulent.

What has been said disposes of every question made in the case, except one, which may be considered more advantageously after the form of the decree is noticed. There were two decrees in the cause. Their effect, taken together, as we understand them, is to order the defendant to pay into the court of bankruptcy the $61,000 received as a preference on June 1, 1903, with interest to the date of the rendition of the final decree, making the total amount to be paid $70,891.54. The theory upon which the decree proceeded was, that no greater sum should be required of the defendant than would be needed to meet the amount of the claims proved or provable against the bankrupt and the cost and expenses of the administration of the bankrupt estate, including fees of counsel for the trustee. As this amount exceeded that received by the defendant by way of preference, the decree exacted of him all that he had received. In computing the amount required to meet the expenses of administration a fee of $15,000, of counsel for the

trustee for their services to him in all matters, including this litigation, was included. The defendant complains that this fee is exorbitant. It certainly appears to be large. It seems, however, that the proper place to raise this question would be in the bankruptcy court. In any event, we would be unwilling to reverse the judgment of the lower courts upon this question, in view of the fact that they have a much more intimate acquaintance with the services than we can possibly have.

All that has been said would naturally lead to an affirmance of the decree. Nevertheless, we are of the opinion that it ought to be modified, for a reason not dwelt upon in argument. Now that this litigation has come to an end, and the defendant has been compelled to surrender the preference which he received, he is entitled to prove his claim and to receive a dividend on it upon an equality with other creditors. *Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356. In view of the fact that this suit was brought in the bankruptcy court itself, and a final decree is to be entered by the judge of that court, it is entirely practicable to avoid the circuitous proceeding of compelling the defendant to pay into the bankruptcy court the full amount of the preference which he has received, and then to resort to the same court to obtain part of it back by way of dividend. The defendant may be permitted, if he shall be so advised, to prove his claim against the estate of the bankrupt, and the bankrupt court then may settle the amount of the dividend coming to him, and the final decree may direct him to pay over the full amount of his preference, with interest, less the amount of his dividend. Solely for the purpose of accomplishing this result, the final decree in the case is reversed and the case remanded to the District Court to take proceedings in conformity with this opinion.

Decree reversed.